THE
MODERN LAW REVIEW

Volume 21 July 1958 No. 4

STORM OVER THE AMERICAN SUPREME COURT [1]

"We are very quiet there," Mr. Justice Holmes wrote of the Supreme Court in 1913, "but it is the quiet of a storm center." [2] That precarious shelter, if it ever really existed, has now been lost. No longer does the court sit secure in the hurricane's eye while the winds of doctrine beat about it; now it is exposed to the full fury of the gale. One has only to read the vituperative Manifesto of 100 Southern Congressmen, or listen to the impassioned speeches at a convention of States' Attorneys-General, or observe the bills introduced in Congress to curb the jurisdiction of the court, to sense the violence of the storm.

It springs, of course, mainly from the decisions in the school segregation cases. But in America social causes are seldom pure and never simple. In fact there has come into being a coalition of disaffected groups warring on the court. To the segregationists must be added those who are disturbed by the decisions which have put procedural limits on legislative investigations and criminal trials of communists and by the decisions which have held that certain anti-subversive laws of the states are superseded by Federal legislation.

A Bill introduced into Congress in July 1957 by Senator Jenner of Indiana would deprive the Supreme Court of its appellate jurisdiction in several specified classes of cases. The list is interesting because it reflects so precisely the immediate dissatisfactions felt by certain groups with current decisions: cases involving the validity of (a) proceedings against witnesses before Congressional committees, or (b) action taken against Government employees on grounds of security, or (c) state laws for the control of subversive activities, or (d) regulations concerning subversive activities in the teaching staffs of public schools, or (e) rules of a state pertaining

[1] A lecture delivered at the London School of Economics and Political Science, March 5, 1958.
[2] Holmes, *Collected Legal Papers*, 292 (1920).

to the admission of persons to the practice of law.[3] Even British empiricism could hardly do better than that in cataloguing without commitment to a principle. It should be said that the American Bar Association has expressed disapproval of this Bill, without taking a position on the merits of the decisions of the court which provoked the proposal. Perhaps it will be enough to say two things about the Bill. In the first place, it is surely odd that judicial review should be curtailed in areas where some of the most basic interests of the individual are threatened by governmental action—freedom from imprisonment and from loss of employment. Secondly, the Bill would be quite grotesque in its operation, since it would leave unreviewable the decisions of state and lower federal courts, however those courts had decided the controversies. When for example, the Supreme Court held state subversive-activities legislation to have been superseded by Federal laws, it was affirming a decision of the Pennsylvania Court to the same effect. It is an ironical feature of the Jenner Bill that, were it to be enacted, it would cut off any opportunity to seek reversal of such state court decisions. Without the segregation issue, it is hardly likely that the actions of the court would have aroused so vehement a response: compared with desegregation they are as popguns to the crack of doom. Nevertheless they have produced a coalition which carries the attack on the court beyond merely sectional lines.

Before examining the immediate situation more closely, it would be well to view it in the perspective of history. Resistance to the court has been a persistent strain in American life from the beginning, and the resistance movements have not by any means been the exclusive province of one section of the country.[4] If I do not reach back into history beyond the end of the eighteenth century, you will understand that the fault is not mine but that of my country. The story of resistance begins as early as 1793, when the Supreme Court entertained a suit against the state of Georgia, giving judgment for the complainants.[5] The Georgia House of Representatives promptly passed a Bill declaring that any Federal marshal who should attempt to collect the judgment would be "guilty of a felony" and should "suffer death without benefit of clergy, by being hanged." Fortunately the Eleventh

[3] The principal decisions reflected in this list are the following: (a) *Watkins* v. *U.S.*, 354 U.S. 178 (1957); (b) *Cole* v. *Young*, 351 U.S. 536 (1956); (c) *Pennsylvania* v. *Nelson*, 350 U.S. 497 (1956); (d) *Slochower* v. *Board of Education of N.Y.*, 350 U.S. 551 (1956); (e) *Schware* v. *Board of Bar Examiners of New Mexico*, 353 U.S. 232 (1957); *Konigsberg* v. *State Bar of California*, 353 U.S. 252 (1957).

[4] The historical background has been surveyed in two recent studies and an earlier one: *Interposition* v. *Judicial Power*, 1 *Race Relations Law Reporter* 465 (Vanderbilt University School of Law, 1956); McKay, *With All Deliberate Speed: A Study of School Desegregation*, 31 N.Y.U.L.Rev. 991 (1956); Warren, *Legislative and Judicial Attacks on the Supreme Court of the United States*, 47 Am.L.Rev. 1, 161 (1913).

[5] *Chisholm* v. *Georgia*, 2 Dall. 419 (1793).

Amendment, declaring the sovereign immunity of States from suit in the Federal courts, put a quietus on resistance growing out of this sort of offended dignity of a state.

But the Alien and Sedition Acts of the Federalist Congress in 1798 precipitated a new storm whose echoes can still be heard. Striving to rally the states against these laws, Virginia enlisted the services of James Madison, and Kentucky those of Thomas Jefferson, who anonymously drafted, respectively, the Virginia and Kentucky Resolutions. The Virginia Resolutions contain the earliest reference to "interposition," a doctrine revived in the recent segregation controversy but as obscure in its operative meaning today as it was in 1798. Madison wrote: " . . . in case of deliberate, palpable and dangerous exercise of other powers not granted by the same compact, the States who are parties have the right, and are in duty bound, to interpose for arresting the progress of evil, and for the maintaining within their respective limits, the authorities, rights, and liberties appertaining to them." For Kentucky, Jefferson wrote in similar vein, casually brushing aside the notion that the court might be the appropriate arbiter of disputes over state and Federal powers: "That the Government created by this compact was not made the final judge of the extent of the powers delegated to itself, since that would have made its discretion, and not the constitution, the measure of its powers; but that as in all other cases of compact among parties having no common judge, each party has an equal right to judge for itself, as well of infractions as of mode and measure of redress." [6] The election of Jefferson in 1800 and the expiration of the Alien and Sedition laws rendered moot the movement which the two states were seeking, with not much success, to launch.

A little later, the action of the Supreme Court of the United States in holding that it had jurisdiction to review the decisions of a supreme court of a state produced a fresh outburst from Virginia. Chief Justice Spencer Roane of that state, whose court had been reversed on writ of error, was unrestrained in denunciation: "A most monstrous and unexampled decision. It can only be accounted for by that love of power which all history informs us infects and corrupts all who possess it, and from which even the upright and eminent judges are not exempt . . . [It is the] zenith of despotic power." [7] In a letter Roane lamented the complacency of Jefferson and Madison, who had meanwhile come to the place of supreme national responsibility while Roane was still a Virginian: "The career of the High Court must be stopped or the liberties of our country are annihilated . . . But Jefferson and Madison hang back too much in this great crisis. Jefferson at

[6] The two sets of Resolutions are printed in Commager, *Documents of American History*, 178–184 (5th ed. 1949).

[7] Commenting on *Cohens* v. *Virginia*, 6 Wheat. 264 (1821). Quoted in 1 Warren, *The Supreme Court in United States History*, 555–556 (rev. ed. 1926).

least ought to do, in regard to republicanism and republicans, what one of the French literati did in regard to the French language. Being on his deathbed and surrounded by friends, one of them sinned against the purity of that language, whereupon the sick man corrected him with great energy. One of his friends seeming surprised that he should do this, under his extreme situation, he replied with increased energy that he would defend the purity of the French language with his last gasp, and instantly expired." [8] The appellate jurisdiction of the Supreme Court has been the target of repeated attacks; from 1821 to 1882 at least ten Bills were introduced in Congress to deprive the court of such jurisdiction in whole or in part, and the pending Bill of Senator Jenner's is in this direct line of descent.

The centrifugal forces were disappointed, too, in Andrew Jackson, a son of South Carolina, who in the White House set himself firmly against the resistance movement in his native state. When the South Carolina legislature declared the tariff of 1828 to be null and void, forbade Federal agents to collect it, and prohibited appeal to the Federal Supreme Court, Jackson countered with the Force Bill of 1833, conferring protective jurisdiction on the Federal district courts, and with the threat of warships in the port of Charleston. A compromise tariff led to South Carolina's withdrawal of the nullification statute. Again there was a fortunate denouement of the crisis. Chief Justice Marshall had a different word for the succession of escapes. Writing in 1832 to his friend Justice Story, he said: "I yield slowly and reluctantly to the conviction that our Constitution cannot last. . . . The Union has been prolonged thus far by miracles. I fear they cannot continue." [9]

The centrifugal forces, as I have suggested, were not confined to the South. Concurrently with these Southern resistance movements the Federal judiciary was the target of attacks in the North. In 1809 the legislature of Pennsylvania defied the Federal Court's ruling on the ownership of a sloop claimed by the state. The Federal marshal was prevented by state troops from serving the process of the court, whereupon a Federal grand jury indicted the commander of the state militia. The Governor wrote to President Madison, doubtless recalling the philosophy of the Virginia Resolutions, but Madison, now bearing a different and broader responsibility, rebuffed him: "The executive is not only unauthorised to prevent the execution of a decree sanctioned by the Supreme Court of the United States, but is expressly enjoined by statute to carry into effect any such decree, where opposition may be made to it." The state troops were withdrawn and the general was convicted, but his sentence was remitted in one month by President Madison.[10]

[8] *Ibid.*, 558.
[9] *Ibid.*, 769.
[10] *Ibid.*, 374–386.

The war of 1812, with its embargo on shipping, produced in the New England Federalists the very sentiments of anti-unionism that were to fortify the South Carolinians in 1832. Just as it had been observed, in answer to Dr. Johnson, that "not the Devil, but St. Thomas Aquinas, was the first Whig," so it was not Calhoun of South Carolina but the New England worthies who may be accounted the first secessionists.

The most profound resistance in the North was precipitated, of course, by the Fugitive Slave law. Convictions of abolitionists under that law in the Federal courts were nullified by habeas corpus proceedings in state courts; and when the Supreme Court of the United States held that the state courts were out of bounds, Chief Justice Taney's opinion was roundly denounced as the work of slaveholders and doughfaces, and Massachusetts went so far as to legislate for the disbarment of any lawyer appearing in court for a slaveowner.[11] This time there was no happy or miraculous outcome. The clamour over the court now merged into the cannonading of the Civil War.

After that war the court provided a reminder that it could be an instrument of cohesion and reconciliation as well as of division. Holding unconstitutional as bills of attainder both state and Federal test oaths of past loyalty as conditions for the practice of the professions, the court helped the country to move down the road to reunion.[12] Thereafter resistance came to be not so much sectional as inspired by group interest. Organised labour fought against the labour injunction; the Progressive Party in its unsuccessful Presidential campaign in 1912 declared itself for the popular recall of judges and of judicial decisions; and the impasse between the court and the Administration in 1937 led to President Roosevelt's court-packing plan, which failed of enactment when, as an irreverent commentator put it, "a switch in time saved Nine."

With this background it is time to come to the desegregation cases themselves. They turn on the phrase "equal protection of the laws" in the Fourteenth Amendment. Does that phrase mean that public educational facilities shall be equal for white and coloured pupils, and if so does equality mean an end of separate schools for the races? In order to answer these questions a preliminary one is relevant: what do we mean by "mean"? The philosopher Wittgenstein has a parable that is much quoted: a wife asks her husband to teach their young son a game, and when the husband teaches the boy to game with dice, the wife protests, "I didn't mean that kind of game." What exactly did she mean by "mean"? That she had mentally addressed herself to the possibility of gambling and had deliberately excluded it from her

11 *Ableman* v. *Booth*, 21 How. 506 (1859); see Haines and Sherwood, *The Role of the Supreme Court in American Government and Politics*, 1835–1864, 224–242 (1957); Swisher, *Roger B. Taney* (1935).

12 *Ex p. Garland*, 4 Wall. 333 (1867); *Cummings* v. *Missouri*, 4 Wall. 277 (1867).

concept of "game," or that if she had so addressed herself she would have made the exclusion? In the case of "equal protection of the laws" I suggest that these possible meanings are not adequate alternatives; that, to follow the parable, it is as if the mother had bequeathed a fund to trustees for the teaching of suitable games to boys, and the question arises seventy-five years later whether a particular game is suitable. Is the meaning to be derived from what the donor had in mind respecting that game, or would have had in mind had she thought of it, or is the meaning rather that she left the decision to be made by the trustees, taking into account the conditions and mores of the day when decision had to be made? The Constitution of the United States contains certain terms like "jury," "bill of attainder," and "letters of marque or reprisal," which take their meaning as words of art from the book of history. The Constitution contains other terms like "commerce among the States," "due process of law," and "lay and collect taxes . . . to provide for the common defense and promote the general welfare" which are open-ended, which have a hard core of historical meaning but are not to be delimited by that historical experience. I would suggest that "equal protection of the laws" is of this category of terms. In 1868 state-supported schools were rare in the South, and Negro education of any sort virtually non-existent there. It would be pointless to seek in the minds of the statesmen of 1868 a definite answer to the question of the meaning of "equal protection" in the 1950's when public schools have become the rule and Negroes have proved that in capacity for learning and teaching, differences are individual rather than racial.

To adopt a phrase of Mr. Justice Holmes's, the meaning of a constitutional term like "equal protection of the laws" is to be gleaned from "its origin and line of growth." [13] Not long ago I happened to be seated at table next to a zoologist, who asked whether the American Constitution was founded on pre-Revolutionary concepts. When I said that some of its provisions were indeed taken from pre-Revolutionary forms and institutions, he quickly inquired whether the judges, in looking to these, did not take account of the principle of growth which they had exhibited—almost verbatim Holmes's phrase. I have never appreciated so vividly the Darwinism of Holmes's thinking.

At all events, the guarantee of equal protection of the laws had a clear origin in the concern over racial discriminations, and it had a significant "line of growth" prior to the desegregation cases. Service on juries was held to come within the clause, despite the argument that jury service is a duty to be performed rather than a privilege to be claimed. Municipal zoning laws on a racial basis were held to be forbidden by the clause despite

[13] *Gompers* v. *U.S.*, 233 U.S. 604, 610 (1914).

the argument that there was perfect equality in the exclusion of Negroes from white districts and whites from Negro districts. Primary elections conducted to select the nominees of each political party were held to require a non-discriminatory suffrage, despite the argument that primary elections are a private affair rather than an activity of the State. And post-graduate education in a State university was held to fall within the equal protection guarantee, though it was contended that education is not one of the civil rights secured by the Fourteenth Amendment.[14] Each of these controversies was earnestly fought and their outcome, however inexorable the logic of the court's position may now appear, was by no means a matter of course.

When the court was faced, finally, with the school cases, three lines of decision were open to it. It might have decided that the old separate-but-equal standard reflected the outermost limit of equal protection of the laws in the year 1954, that segregation enforced by law was consistent with the national understanding of the meaning of legal equality. Such a decision would surely have been found as repugnant as was, in different quarters, the decision actually reached. The court might, in the second place, have treated the issue as a "political question," to be determined by Congress under its specific power to legislate in order to carry out the provisions of the Fourteenth Amendment. This solution must have had a certain attraction for judges aware of the problems of enforcement of judicial decrees in this area. And yet to have resorted to this evasive solution would itself have created new law, since hitherto, for seventy-five years, Congress had left it to the court to develop the content of the equal-protection guarantee. To announce now that the responsibility rested in truth on Congress would have been something of an Alphonse-Gaston game, with no one going through the door.

The court, instead, took the responsibility, and did so in measured stages, first announcing the principle of non-segregation and later, after a delay for further argument of counsel, considering the form of the decree.[15] The critical terms of the decree are, of course, "deliberate speed"—a phrase taken from English Chancery practice and not, as some litterateurs believed, from the refrain in Francis Thompson's "Hound of Heaven": "deliberate speed, majestic instancy." If poetic terms are insisted on, the court preferred Thompson's refrain (or the first part of it) to Keats's: "Thou foster-child of silence and slow time."

To turn to the Arkansas case itself. The Federal district court issued a decree requiring an abandonment of enforced segregation in the public schools of Little Rock, and to this decree the local

[14] *Ex p. Virginia*, 100 U.S. 339 (1880) (jury); *Buchanan* v. *Warley*, 245 U.S. 60 (1917) (zoning); *Smith* v. *Allwright*, 321 U.S. 649 (1944) (primary election); *Missouri ex rel. Gaines* v. *Canada*, 305 U.S. 337 (1938) (state university).

[15] *Brown* v. *Board of Education*, 347 U.S. 483 (1954), 349 U.S. 294 (1955).

school board was prepared to conform. The local authorities were apparently ready to deal with any difficulties or disturbances that might arise. But the Governor, asserting that violence was impending, ordered the state militia to patrol the area and keep Negro children from entering the school buildings, thus blocking the performance of the district court's decree. Thereupon, the district judge summoned the Governor and enjoined him from proceeding with his military orders. It was at this point that the President of the United States intervened by "Federalising" the state militia and calling in regular Federal troops—in support, be it noted, not merely of a general doctrine laid down by the Supreme Court, but of a specific order of a Federal district judge. In this respect, the President's action resembles that taken by President Cleveland in the Pullman strike of 1894, when he deferred sending troops into the Chicago area to protect the mails and the channels of interstate commerce until the Federal district court there had specifically enjoined the strike leaders.

The matter is now pending in the intermediate Federal Court of Appeals, on appeal by the Governor from the order of injunction.[15a] It would not be proper to predict the outcome; but it requires no gift of prophecy to foresee that on behalf of the judge's ruling, and in reply to the Governor's insistence that he alone, and not the courts, must possess the authority to decide on the necessity of military force to prevent disorder, there will be cited to the Court of Appeals the opinion of Chief Justice Hughes in a case (*Sterling* v. *Constantin*) decided in 1932. In that case, Governor Sterling of Texas called out the state militia to keep certain oil fields shut down pursuant to an order of the state utilities commission, despite the fact that a suit was pending in the Federal district court to set aside the order as unconstitutional and the court had issued a temporary decree suspending the commission's order. The Governor acted on the ostensible ground that in his judgment there would be a "warlike riot, a state of insurrection" unless the orders curtailing production were enforced by the military. The district judge enjoined the Governor, and when the case reached the Supreme Court, Chief Justice Hughes delivered this answer to the Governor's claim of absolute discretion[16]:

> "It does not follow from the fact that the Executive has this range of discretion [to make arrests in order to head off insurrection], deemed to be a necessary incident of his power to suppress disorder, that every sort of action the Governor may take, no matter how unjustified by the exigency or subversive of private right and the jurisdiction of the courts, otherwise available, is conclusively supported by mere executive fiat. The contrary is well established. What are the allowable

[15a] Since this article went to press an order has been made by another Federal district judge suspending integration in Little Rock Central High School until 1961. This order is also under appeal. (Ed.)

[16] 287 U.S. 378, 400–402 (1932).

> limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions. . . . Instead of offering them [the complaining well-owners] protection in the lawful exercise of their rights as determined by the courts, he sought, by his executive orders, to make that exercise impossible. . . . In particular, to the process of the Federal court actually engaged in examining and protecting an asserted Federal right, the Governor interposed the obstruction of his will, subverting the Federal authority. The assertion that such action can be taken as conclusive proof of its own necessity and must be accepted as in itself due process of law has no support in the decisions of this court. . . . If it be assumed that the Governor was entitled to declare a state of insurrection and to bring military force to the aid of civil authority, the proper use of that power in this instance was to maintain the Federal court in the exercise of its jurisdiction and not to attempt to override it, to aid in making its process effective and not to nullify it, to remove, and not to create, obstructions to the exercise by the complainants of their rights as judicially declared."

In short, if there was a danger of disorder, the Governor had ordered the troops to point their rifles in the wrong direction. Suppose that in the Arkansas case the Court of Appeals finds *Sterling* v. *Constantin* controlling and affirms the decree of the district court.[16a] Suppose, further, that the Federal troops are withdrawn and the Governor reverts to his earlier actions. What ultimate sanction is available to control him? The legal sanction would be, of course, a penalty of fine or imprisonment for contempt of court. That possibility raises some problems of its own. When a contempt of court is also a violation of criminal law, the defendant is entitled, under the Clayton Act of 1914, to have the contempt charges tried by a jury (unless the United States was the plaintiff, a situation not present in the school segregation cases).[17] The question of a jury trial would thus turn on whether the Governor's actions would amount to a violation of Federal criminal law; this they presumably would, since it is a crime under the Civil Rights Acts wilfully, under colour of state law, to deprive any person of rights guaranteed by the Federal Constitution.[18] And so in our hypothetical case there would appear to be a right to trial by jury, with all its unpredictable consequences—save for one escape: the right to demand a jury applies to criminal, not to civil, contempt. The difference rests in the approach which the judge takes to the vindication of his authority. If he punishes absolutely, by fine or imprisonment, the contempt is of the criminal variety; if he makes his order conditional—a fine or imprisonment unless or until the offender brings himself into obedience—the contempt is civil. The offender, it is

[16a] Since this was written the decree has in fact been affirmed by the court of appeals, on April 28, 1958.

[17] *Michaelson* v. *U.S. ex rel. Chicago, St. Paul, etc., Ry.*, 266 U.S. 42 (1924).

[18] See *Screws* v. *U.S.*, 325 U.S. 91 (1945).

said, carries the key to the prison door in his pocket.[19] Thus, a district judge, in the event of recalcitrance, would be able to act, should he be so disposed, without a jury.

But to be told that in a contest between court and Governor the judge holds the final trump is hardly a comforting assurance. The conflicting currents run much deeper in this river of doubt. Will the court and the Constitution be saved once more by a "miracle," or is this to be a kind of Fugitive Slave law in reverse, another irrepressible conflict?

It would be idle to look for a sudden, miraculous reconciliation. For one thing, resistance to integration flows from a deep spring of primitive, sub-rational fears, summed up in the frightful spectre of "mongrelisation" of the races. To exorcise this image is not the work of a day or a year. It may be slowly dissipated as the evidence is borne in that miscegenation, licit and illicit, actually declines when the status and self-respect of the Negro are enhanced. Besides this basic fear, there are quite genuine problems of administration to be resolved. In districts where the Negro population exceeds that of the whites, the consequence of desegregation is that the white children, in effect, will be attending coloured schools rather than the other way round, and the preponderance of the teaching staff may also be coloured. The relative neglect of Negro schools until recent years may have its repercussions here in a more general lowering of scholastic standards in the community. Where this kind of problem is present, the concept of deliberate speed may serve to ameliorate it, provided a bona fide scheme for orderly desegregation is put in train. Various expedients might be employed: desegregation by grades, starting with the lowest; additional classes for retarded pupils; special teacher-training programmes. Again, the most hopeful prospect is the accumulation of evidence from communities which have in fact made a successful change-over.

If miracles of reconciliation are not to be expected, neither, I believe, is undying resistance. When we speak of "The South" we apply a unitary symbol to what is in fact a region of increasing variety and complexity. This is obvious enough when we differentiate the border South from the deep South. In the border South, cities with relatively large Negro populations have made the change-over to desegregated schools with exemplary dispatch: for example, Baltimore, Louisville and St. Louis. But even in the deep South the social structure is not a monolithic and impenetrable barrier to change. Let me indicate some of the elements in the fabric that have a quality of their own.[20]

In the first place, all the major church groups have officially

[19] See the *Michaelson* case, *supra*, note 17 at 65. More generally, see Note, "Implementation of Desegregation by the Lower Courts," 71 Harv.L.Rev. 486 (1958).

[20] *Cf.* Ashmore, *An Epitaph For Dixie* (1957). The author is the thoughtful executive editor of the *Arkansas Gazette*.

declared their support of the court's decision.[21] Between such pronouncements and action on the level of local congregations there is, of course, a distinct lag. But given the influence of organised religion in the deep South, the lag may be expected to diminish. A Southern editor tells the story of a group of local citizens conferring on their position regarding desegregation; when one of them suggested calling in a minister, another remarked, "Oh, he would only give us the Christian answer." At any rate there is bound to be a gnawing spiritual discomfort.

In the second place, there are signs of internal tension between urban and rural areas. As the deep South moves toward greater industrialisation the problem of desegregation is put in a new perspective. Northern capital is eagerly invited, and inducements of all sorts are offered: low taxes, public aid for construction of plants, lower wage scales, and stable conditions of employment. Any cloud of disorder hovering over the area would darken the business scene. It is not without significance that the industrial and financial community in Little Rock are reported not in sympathy with the Governor's conduct. Indeed it is worth remembering that it was not the local Mayor but the state Governor who intervened against the court's decision. There are signs elsewhere that the strength of the resistance movement is more largely in the state capitals and rural areas whose representation predominates in state government than in the major cities. At all events, there are divisive forces within a state as well as between state and Union. In Virginia, for example, the state legislature threatens to cut off appropriations to any local community which dares to embark on desegregated schooling. Like so much else in the American Federation, the problem reverts to the structure of politics, in particular the over-representation of rural areas and small towns as compared with the municipalities. But the existence of this intra-state tension is likely to weaken the resistance movement itself.

A third element making for a breach is the Negro population itself, exercising its political rights. The Civil Rights legislation enacted by Congress in the summer of 1957 is strongest in the protection of the right of suffrage. As the Negroes come to participate on a larger scale in the political process, strategic possibilities are opened up for making their power felt.

As a fourth factor I would put the influence of the younger generation. Though I cannot adduce the support of a Gallup Poll or of a deep-interviewing technique, my impressionistic and unscientific observation leads me to believe that if the question were left to the voice of those who since the war have served in the armed forces or attended a university, the resistance movement would be relatively weak. The younger generation, for all its

[21] See Fairman, "The Attack on the Segregation Cases," 70 Harv.L.Rev. 83, 93, (1956).

deficiencies and delinquencies, is characteristically open-minded and generous in sympathy. Not long ago, in Little Rock, a symposium was broadcast, in which the participants were a group of white and Negro high-school pupils. The discussion was unrehearsed and candid, and it produced the rare spectacle of participants actually changing their minds in the course of their exchange of views. Let me quote the concluding portion of the recorded transcript, as published in the *New York Times* of October 20, 1957:

> "Minnijean [a coloured pupil]: . . . do you know anything about me, or is it just what your mother has told you about Negroes? . . .
>
> "Mrs. Ricketts [moderator]: . . . Have you ever really made an effort to try to find out what they're like?
>
> "Kay: Not until today.
>
> "Sammy: Not until today.
>
> "Mrs. Ricketts: And what do you think about it after to-day?
>
> "Kay: Well, you know that my parents and a lot of the other students and their parents think that the Negroes aren't equal to us. But—I don't know. It seems like they are, to me.
>
> "Sammy: These people are—we'll have to admit that.
>
> "Ernest: I think, like we're doing today, discussing our different views . . . if the people of Little Rock . . . would get together I believe they would find out a different story—and try to discuss the thing instead of getting out into the street and kicking people and calling names . . .
>
> "Kay: I think that if our friends had been getting in this discussion today, I think that maybe some of them—not all of them—in time, they would change their mind. But probably some of them would change their mind today.
>
> "Sammy: I know now that it isn't as bad as I thought it was—after we got together and discussed it . . .
>
> "Mrs. Ricketts: Let's see. Is there anything, finally, we want to say that we have to say now?
>
> "Kay: [Sammy and I] both came down here today with our mind set on it [that] we weren't going to change our mind that we were fully against integration. But I know now that we're going to change our mind.
>
> "Mrs. Ricketts: What do your parents say to that?
>
> "Kay: I think I'm going to have a long talk with my parents."

One can hope that in this colloquy there speaks, unaffected and uncoerced, the voice of the future.

You will observe that in enumerating the forces pointing toward reconciliation with the court's decision—the churches, the industrialised cities, the Negroes themselves, and the young people—I have not assumed that respect for law provides, in itself, a sufficient motive power to reach the goal. Respect for positive law is indeed a powerful ally on the side of the court, as it has been throughout

American history. But such respect did not provide the last word on the *Dred Scott* case or the Fugitive Slave law. It must be remembered that in the dialectic of American history there has also been a strong strain of resistance to the unjust law. After all, it was from Henry David Thoreau's *Civil Disobedience* that Gandhi derived his principle of passive resistance.

This moral criterion in the legal order is too important and valuable to ignore, and it may be profitable to see how it affects the issue of compliance with the desegregation decision. If the resisters really stand in the great tradition they are entitled to corresponding respect. I take it that the tradition manifests itself differently in public and in private hands. For a public officer the great example is President Lincoln facing the *Dred Scott* decision, which seemed to foreclose any attempt by Congress to legislate against slavery in the territories. It was Lincoln's position that the decision need not be taken to have settled the question for the political branch; indeed, the court itself has always remained open to self-correction, yielding, as one of its members put it, to the lessons of experience and the force of better reasoning. But Lincoln was careful not to counsel or countenance disobedience of a decision as a specific decree affecting the immediate parties; as to that, he said, "We offer no resistance to it."[22] The contrast with the Little Rock situation is plain enough. Governor Faubus is not likely to be identified in history with Abraham Lincoln, any more than with that Roman General whose name is curiously similar but who was, after all, both Cunctator and Maximus.

The other branch of the tradition is represented more directly by Thoreau, who, on being asked by Emerson what he was doing in jail, replied, "What are you doing outside?" Civil disobedience implies not evasion or forcible opposition (I am not speaking of a régime of pseudo-law or enemy occupation). It implies rather the moral force of sacrifice, standing up to the sanctions of the law so that others may have their moral sense awakened and sharpened by the example of suffering. Measured by this standard, we may well ask whether the great tradition of moral nonconformity is best illustrated by The White Citizens' Councils or by the band of Negroes in Montgomery, Alabama, who, under the leadership of their pastor, refused to comply with the local rules of segregation in buses and either submitted to arrest or walked to their work like pilgrims.

It is right not to rest the case for obedience on positive law alone. Positivists and natural-law thinkers are at one on this—or, at any rate, the more thoughtful of them.[23] Whether with the

[22] Speech of June 26, 1858 (in the Lincoln-Douglas debates) and the First Inaugural, March 4, 1861, both quoted in 2 Warren, *op. cit. supra*, note 6, at 330–332.

[23] I have in mind the penetrating essays by Professors H. L. A. Hart and L. L. Fuller in a recent number of the *Harvard Law Review*: Hart, "Positivism and the Separation of Law and Morals," 71 Harv.L.Rev. 593 (1958); Fuller, "Positivism and Fidelity to Law," *ibid.*, 630.

Positivists one finds the moral criterion outside the law, or with the natural-law jurists immanent in the law, so that law is not merely order but good order, the moral norm ought not to be lost. What is equally important is that it not be misapplied. That is why the storm over the Supreme Court, which in one aspect may appear to have only a local or ephemeral interest, does in fact agitate issues that lie within the legal order everywhere and always.

Paul A. Freund.*

* Royall Professor of Law, Harvard University.

THE OCCUPIERS' LIABILITY ACT

THE Occupiers' Liability Act, 1957, which came into force on January 1, 1958, makes important changes in the law governing liability for injuries suffered on dangerous premises. The Act gives effect to the recommendations of the Law Reform Committee,[1] and substitutes for the common law rules which previously regulated an occupier's liability towards his invitees, licensees and contractual visitors a set of statutory provisions which constitute a minor code. In this article the effect of the Act will be briefly examined.

A SINGLE DUTY TO ALL LAWFUL VISITORS

The principal change made by the Act is to impose on an occupier of premises[2] the same duty, described as the "common duty of care," towards all his lawful visitors, "except in so far as he is free to and does extend, restrict, modify or exclude his duty to any visitor or visitors by agreement or otherwise."[3] The persons by whom and to whom the common duty of care is owed are the same "as the persons who would at common law be treated as an occupier and as his invitees or licensees."[4] The duty owed to a person who enters premises in exercise of a contractual right with the occupier, so far as it depends on a term to be implied in the contract, is also the common duty of care.[5] The Act therefore

[1] Third Report, Cmd. 9305. Noted by Mr. R. F. V. Heuston (1955) 18 M.L.R. 271.

[2] The new rules apply also to a person occupying or having control over any fixed or movable structure, including any vessel, vehicle or aircraft, to the same extent as the previous common law rules: ss. 1 (3) (*a*), 5 (2). See Salmond on *Torts* (12th ed.), pp. 475–476. But the Act does not affect the obligations imposed on a person "by or by virtue of any contract for the hire of, or for the carriage for reward of persons or goods in, any vehicle, vessel, aircraft or other means of transport, or by virtue of any contract of bailment": s. 5 (3). In a contract for the hire of a vehicle a term will ordinarily be implied that the vehicle is as fit and safe for the purpose intended as reasonable care and skill can make it: see *Hyman* v. *Nye* (1881) 6 Q.B.D. 685; *Read* v. *Dean* [1949] 1 K.B. 188. On the liability of a carrier for reward for the structural safety of the conveyance, see the recent case of *O'Connor* v. *British Transport Commission* [1958] 1 All E.R. 558.

[3] s. 2 (1). Persons who enter premises for any purpose in exercise of a right conferred by law are to be treated as permitted by the occupier to be there for that purpose, whether they in fact have his permission or not: s. 2 (6). But a person entering any premises in exercise of rights conferred by an access agreement or order under the National Parks and Access to the Countryside Act, 1949, is not a visitor of the occupier for the purposes of the Act: s. 1 (4). The effect of an access agreement or order seems to be that the occupier owes such a person no higher duty than he would owe to a trespasser: see National Parks and Access to the Countryside Act, 1949, s. 66 (2).

[4] s. 1 (2).

[5] s. 5 (1). This section does not apply to contracts entered into before January 1, 1958.

abolishes the common law distinction between invitees, licensees and contractual visitors. It is true that this is not done in so many words, but no significance is to be attached to this omission. A legal distinction is abolished by depriving it of legal consequence, and this is what the Act has done by providing that the old common law distinctions shall no longer determine the incidence of different rules of law; though, as we shall see, the broad considerations on which the common law distinctions were founded may still be relevant to the question whether the common duty of care has been discharged in a particular case.

The Act makes no change in the law governing liability to trespassers, and so, while it will no longer be necessary to classify a lawful visitor as an invitee, licensee or contractual visitor, it will still be necessary to resort to the old law in order to determine whether the plaintiff would have been a licensee, express or implied, or a trespasser.[6] Indeed, since the effect of the Act is to improve the position of a person who was a mere licensee under the old law, it may be said that the distinction between licensees and trespassers is now of even greater consequence. What effect this widening of the gap between the licensee and trespasser will have on marginal cases is uncertain. Now that a more positive duty is imposed on an occupier to prevent injury to all his lawful visitors, it may be, as the Law Reform Committee appeared to contemplate,[7] that judges and juries will be less astute to infer implied licences than has sometimes been the case in the past.

The Common Duty of Care

The " common duty of care " is defined by section 2 (2) as " a duty to take such care as in all the circumstances is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there." This definition is amplified by a number of further provisions in the same section.

One of these provides that " the circumstances relevant for the present purpose include the degree of care, and of want of care, which would ordinarily be looked for in such a visitor, so that (for example) in proper cases—

(*a*) an occupier must be prepared for children to be less careful than adults; and

[6] The old cases will also be relevant in determining the boundaries of the invitation or licence: *Mersey Docks & Harbour Board* v. *Procter* [1923] A.C. 253; *Pearson* v. *Coleman Bros.* [1948] 2 K.B. 359. In this connection the old doctrine of " allurement " will still be relevant when the visitor is a child, for the existence of an " allurement " on a part of the premises to which a child is forbidden to go may prevent an occupier from maintaining that the child, attracted by the " allurement," was a trespasser in going on that part of the premises: see *Glasgow Corp.* v. *Taylor* [1922] 1 A.C. 44; *Holdman* v. *Hamlyn* [1943] K.B. 664, 668; *Gough* v. *N. C. B.* [1954] 1 Q.B. 191, 201.

[7] Cmd. 9305, pp. 30–31.

(*b*) an occupier may expect that a person, in the exercise of his calling, will appreciate and guard against any special risks ordinarily incident to it, so far as the occupier leaves him free to do so." [8]

So far as regards children, it is difficult to see that this provision adds anything to the general definition of the common duty of care, since it is well established that a duty to take reasonable care requires one to take account of the fact that children are less careful than adults.[9]

In a number of recent cases the courts have shown a reluctance to saddle occupiers with liability for injuries suffered by very young children where there has been no "allurement" and the danger would have been obvious to a person of more mature years.[10] It has been said that the primary duty of guarding very young children from such dangers lies on the parent or guardian and not on a person who allows children to play on his land.[11] In *Phipps* v. *Rochester Corporation*,[12] for example, children of mixed ages were allowed by the defendants to play on their land. The plaintiff, a boy of five, accompanied only by his seven-year-old sister, fell into an open trench and broke his leg. Devlin J. held that the plaintiff was a licensee, but that the defendants could discharge their duty to him by showing that the danger would have been obvious to a guardian or else that they had given warning of it comprehensible to a guardian.[13] Since the defendants were able to discharge this burden, the action failed.

It is doubtful whether the Act alters the law at all on this point. The duty imposed on an occupier is a duty to take reasonable care in all the circumstances of the case, and though he "must be prepared for children to be less careful than adults," and thus will often have to make special provision for child visitors, it will still be relevant to consider whether he could reasonably expect a very young child coming on to his land to be accompanied by a person of discretion. The recent case of *O'Connor* v. *British Transport Commission* [14] shows that the principle of *Phipps*' case is not confined to liability for dangerous structures, but is generally relevant to liability in negligence.

The further provision that an occupier may expect a visitor to appreciate and guard against any special risks ordinarily incident to his calling is presumably intended to give statutory approval to

[8] s. 2 (3).
[9] *Lynch* v. *Nurdin* (1841) 1 Q.B.D. 29; *Glasgow Corp.* v. *Taylor* [1922] 1 A.C. 44, 67; *Yachuk* v. *Oliver Blais Co., Ltd.* [1949] A.C. 386.
[10] *Phipps* v. *Rochester Corp.* [1955] 1 Q.B. 450; *Dyer* v. *Ilfracombe B.C.* [1956] 1 All E.R. 581; *O'Connor* v. *British Transport Commission* [1958] 1 All E.R. 558.
[11] *Phipps* v. *Rochester Corp.* [1955] 1 Q.B. 450, 472; *O'Connor* v. *British Transport Commission* [1958] 1 All E.R. 558, 563, 565.
[12] [1955] 1 Q.B. 450.
[13] At p. 472.
[14] [1958] 1 All E.R. 558.

decisions like *Christmas* v. *General Cleaning Contractors, Ltd.*,[15] in which it has been held that the primary duty of guarding a workman, sent out to work on another's premises, against the special risks of his job lies on his employer, rather than on the occupier of the premises.

Another subsection of section 2 provides that " where damage is caused to a visitor by a danger of which he had been warned by the occupier, the warning is not to be treated without more as absolving the occupier from liability, unless in all the circumstances it was enough to enable the visitor to be reasonably safe." [16] The common law defence of voluntary assumption of risk is, however, expressly preserved.[17] *London Graving Dock Co., Ltd.* v. *Horton* [18] is therefore no longer law. The effect of a warning or the plaintiff's full knowledge of a danger will now presumably be governed by the same principles as in an ordinary action of negligence. In most cases a warning will still absolve the occupier from any further duty towards a visitor. But if the circumstances are such as to make it reasonable for the visitor to incur a known risk a warning will not be sufficient.[19] " The question is whether the danger was such that, in the circumstances, no sensible man would have incurred it or, in other words, whether the plaintiff's exposing himself to the danger was a want of common or ordinary prudence on his part." [20]

Whether or not the common duty of care has been discharged in a particular case will be a question of fact, for the jury if there is one. But jury trials are virtually unknown in claims of this sort, and in accordance with the general tendency in a system of appeals from judges sitting alone for questions of fact to be turned into questions of law,[21] it is likely to be only a matter of time before we have authoritative pronouncements on the relevance of various circumstances to the degree of care required of an occupier. Indeed, it was the prospect of this happening and the likelihood that the courts will in course of time, by a process of interpretation, evolve a new set of rules as to what constitutes compliance with a broad statutory formula that caused Mr. Diplock, Q.C. (as he then was), to dissent from the recommendation of the majority of the Law

[15] [1952] 1 K.B. 141 (affirmed *sub nom. General Cleaning Contractors, Ltd.* v. *Christmas* [1953] A.C. 180). See also *O'Reilly* v. *I. C. I., Ltd.* [1955] 1 W.L.R. 1155.

[16] s. 2 (4) (*a*).

[17] s. 2 (5).

[18] [1951] A.C. 737.

[19] *Clayards* v. *Dethick* (1848) 12 Q.B. 439; *Haynes* v. *Harwood* [1935] 1 K.B. 146; *Hyett* v. *G. W. R.* [1948] 1 K.B. 345; *A. C. Billings & Sons, Ltd.* v. *Riden* [1957] 3 All E.R. 1.

[20] *A. C. Billings & Sons, Ltd.* v. *Riden* [1957] 3 All E.R. 1, at p. 7 (*per* Lord Reid).

[21] See the observations of du Parcq L.J. in *Easson* v. *L. N. E. Ry.* [1944] K.B. 421, at 426, and Lord Greene M.R. in *Morris* v. *Luton Corp.* [1946] K.B. 114, at 115, and compare the development of an employer's common law duty of care to his workmen.

Reform Committee that the common law categories of different visitors should be completely abolished.[22]

Though the distinction between invitees and licensees has been abolished, the broad consideration of material advantage to the occupier which was the basis of the distinction may still be relevant to the question whether the common duty of care has been discharged in a particular case. It is curious that the Law Reform Committee should have considered that the purpose for which a visitor enters premises, and the element of material advantage to the occupier in that purpose, should on principle be irrelevant to the standard of care required on the part of the occupier.[23] It is true, as the Committee contended, that the occupier has control over the state of the premises and must know that people whom he permits to enter the premises may be injured by any defect which he allows to arise, whatever the purpose for which they enter. But it does not necessarily follow from this that one and the same standard of care should be owed to all lawful visitors, whatever the reason for their entry. Equal foresight of injury and opportunity to prevent it do not always give rise to the same duty of care. Indeed, a duty to take affirmative steps to prevent foreseeable injury to others is still the exception rather than the rule.[24] English law is not alone in being reluctant to hold a defendant liable for omissions to act in the absence of some special relationship between the parties.[25] And just as the relation between the parties has an important bearing on the question whether a duty exists at all, so it has often been held that the extent of the duty may depend on the precise nature of the relationship.[26] Whether or not the importance of the relationship should be reflected in different and rigid legal categories, with varying rules of duty, as in the old common law rules governing dangerous structures, or should merely be taken into account among other factors in applying a broad principle of liability, is primarily a question of juridical technique. The modern tendency, as Devlin J. has recently remarked,[27] is away from rigid categories in favour of a broad flexible principle, and the Occupiers' Liability Act is in tune with this tendency. But this does not entail that the considerations on which the old rigid categories

22 Cmd. 9305, pp. 43–44.

23 *Ibid.*, pp. 24–26.

24 See Salmond, *op. cit.*, pp. 407–408.

25 See F. H. Lawson, *Negligence in the Civil Law* (1950), pp. 31–36.

26 *e.g.*, liability of bailees (see Halsbury, *Laws of England*, 3rd ed., Vol. 2, p. 96); liability for defects in chattels gratuitously lent or given (see Salmond, *op. cit.*, pp. 537–538). The importance of the element of advantage or consideration in a relationship is also shown by the fact and nature of the terms often implied in contracts. Implying a term in a contract is an act of policy directed at doing substantial justice between the parties. In the absence of a contractual relation and its implied terms there is sometimes no duty to take care to prevent foreseeable injury: see, for example, *East Suffolk Rivers Catchment Board* v. *Kent* [1941] A.C. 74; *Sellars* v. *Best* [1954] 1 W.L.R. 913.

27 *Behrens* v. *Bertram Mills Circus, Ltd.* [1957] 2 Q.B. 1, 14.

were founded are therefore irrelevant in applying a broad principle of liability.

It is unprofitable to speculate further on what other circumstances will be regarded as relevant to the discharge of the common duty of care. Fears were expressed during the House of Commons' debates on the Bill that the courts will differentiate various "purposes" for which premises are entered and in so doing will develop a body of case law with as many refinements and narrow distinctions as the old law.[28] But it is doubtful whether any particular significance is to be attached to the requirement that the visitor should be reasonably safe "in using the premises for the purposes for which he is invited or permitted by the occupier to be there." "Purposes" is an ambiguous word, and its use in this context would seem to mean no more than that the premises should be reasonably safe for the particular use implied in the invitation or licence. As Scrutton L.J. once said, "when you invite a person into your house to use the staircase you do not invite him to slide down the banisters."[29]

Excluding the Common Duty of Care

The Act, as we have seen, provides that an occupier shall owe the common duty of care to all his visitors "except in so far as he is free to and does extend, restrict, modify or exclude his duty to any visitor or visitors by agreement or otherwise."[30] An occupier can therefore exempt himself from the common duty of care to the same extent and by the same methods as he could exclude his duty to a visitor under the old law.

This provision of the Act has already attracted considerable comment and criticism.[31] Curiously, there was no clear authority on the ability of an occupier to exclude his liability to a visitor under the old law, other than by express agreement, until the recent decision of the Court of Appeal in *Ashdown* v. *Samuel Williams & Sons, Ltd.*[32] It was there held that an occupier could effectively exclude his liability to a licensee making use of his premises by displaying an adequate notice disclaiming liability, even though the licensee had not in fact read the notice. Though the plaintiff in *Ashdown's* case was a licensee, and the Court of Appeal found support for its conclusion in the general proposition that a licence may be granted subject to conditions,[33] there is no reason to suppose that the decision is not equally applicable to a

[28] H.C. Debates, 566, col. 477.

[29] *The Calgarth* [1927] P. 93, at 110.

[30] s. 2 (1).

[31] L. C. B. Gower (1956) 19 M.L.R. 532–537; F. J. Odgers (1957) Camb.L.J. 42–49; (1956) 72 L.Q.R. 471.

[32] [1957] 1 Q.B. 409 (affirming the judgment of Havers J. [1956] 2 Q.B. 580).

[33] It had previously been held, in *Wilkie* v. *L. P. T. B.* [1947] 1 All E.R. 258 (C.A.), that conditions exempting a bus company from liability could be attached to free travel passes issued to its employees.

case where the visitor is, or would at common law have been, an invitee.

The plaintiff's injuries in *Ashdown's* case were caused, not by the static condition of the premises, but by shunting operations carried out by the occupier's servants, and it was argued for the plaintiff that the terms of the notice, whatever their effect in relation to static dangers on the premises, were not effective to exclude liability for supervening negligence of the sort which caused her injuries. But the court held that a notice adequately framed could, and in *Ashdown's* case did, exclude liability for such negligence. If the visitor's injuries are caused by a use of the land not within the contemplation of the visitor, a general exclusion of liability for negligence may not be effective.[34] In *Ashdown*, however, the plaintiff knew of the risk she ran from shunting operations in using the defendant's premises.

The decision in *Ashdown's* case has been strongly criticised by Professor Gower in a note in an earlier issue of this *Review*.[35] As he there points out, if occupiers were to make a general practice of exhibiting notices excluding their liability, the results could be startling. But the decision is undoubtedly in accord with general principle, and Professor Gower's real quarrel would seem to be with the general rule which allows a person by such conditions to exclude his ordinary liability, rather than with the particular application of it to liability for dangerous premises.[36] The subject is a difficult one, for though the general rule often leads to unsatisfactory results, and has been breached in places by statute,[37] it can hardly be contended that a defendant should never be allowed to take advantage of such conditions, *e.g.*, when the exemption from liability is specially bargained for. Short of making special provision for a variety of different cases, it is difficult to see what course was open to the draftsman than to adopt, as he did, the common law rule.

If the visitor has actual knowledge of a condition by which the occupier excludes his liability his claim might also be barred by section 2 (5) of the Act, which preserves the common law defence of assumption of risk. The effect of a notice excluding liability should, however, be carefully distinguished from the effect of a notice warning a visitor of a danger. The latter, as we have seen, will absolve the occupier from liability only if it was enough to enable the visitor to be reasonably safe.

34 [1957] 1 Q.B. 409, 420, 430.

35 (1956) 19 M.L.R. 532–537.

36 The courts have often exercised considerable ingenuity in order to deprive defendants of the benefit of exemption clauses. For a summary of the various devices used, see the note by Professor Gower in (1954) 17 M.L.R. at 155–157.

37 Carriers Act, 1830, ss. 4, 6; Law Reform (Personal Injuries) Act, 1948, s. 1 (3); Road Traffic Act, 1930, s. 97.

Liability for Independent Contractors

The Law Reform Committee thought it more consonant with a general obligation to take reasonable care that an occupier should not in all cases be liable for the negligence of an independent contractor employed to do work on the premises.[38] Consequently, section 2 (4) (*b*) of the Act provides that " where damage is caused to a visitor by a danger due to the faulty execution of any work of construction, maintenance or repair by an independent contractor employed by the occupier, the occupier is not to be treated without more as answerable for the danger if in all the circumstances he had acted reasonably in entrusting the work to an independent contractor and had taken such steps (if any) as he reasonably ought in order to satisfy himself that the contractor was competent and that the work had been properly done."

Thomson v. *Cremin*[39] is therefore no longer law in so far as it decided that the duty owed to a visitor is personal to the occupier in the sense that he cannot get rid of it by entrusting its performance to an independent contractor. It should be noted that the occupier is not protected unless in all the circumstances it was reasonable for him to entrust the work to an independent contractor. Careful choice of a contractor and supervision of his work will be of no avail if it was not reasonable in the circumstances to employ a contractor, rather than a servant, to do the work in question. It will presumably be reasonable to employ a contractor where, as in *Haseldine* v. *Daw & Son, Ltd.*,[40] the work to be done requires special knowledge, skill or equipment not possessed by the ordinary occupier or his servants. Indeed, the occupier would often be guilty of personal negligence if he did not entrust such work to a contractor. What other circumstances would make it reasonable to employ an independent contractor, it is not easy to say. The employment of contractors to do work is ordinarily dictated by considerations of personal convenience and commercial advantage, and it is a little difficult to apply any criterion of reasonableness in such matters. One possibility is that the courts will hold that it is reasonable to employ a contractor to do work when it is the common commercial practice to do so, even though no special skill or equipment is required.[41]

Contributory Negligence

Under the old law there was considerable doubt whether the defence of contributory negligence was applicable to a claim by either an invitee or licensee, since the duty owed to both appeared to be

[38] Cmd. 9305, p. 33.
[39] [1953] 2 All E.R. 1185.
[40] [1941] 2 K.B. 343. *Cf. Woodward* v. *Mayor of Hastings* [1945] K.B. 174; *Bloomstein* v. *Railway Executive* [1952] 2 All E.R. 418.
[41] A case in point would be office cleaning, a great deal of which is nowadays done by independent contractors.

conditional on the visitor exercising due care for his own safety.[42] It is remarkable, therefore, that the Act, which, as we have seen, takes the form of a minor code, does not deal expressly with the question whether the defence applies to a claim under the new law, especially since the defence of assumption of risk is expressly provided for.[43]

It is hardly conceivable that the defence was not intended to apply, and it is, of course, true that it would ordinarily apply on general principle to any claim based on a new statutory duty without express provision. But the omission in the general context of the Act to provide expressly for the defence is sure to be seized upon by counsel as significant. It is also arguable that the wording of some of the provisions defining and amplifying the common duty of care is hardly appropriate to the application of the defence to the same extent as in other classes of claim. Thus, the duty of an occupier under the Act is to take reasonable care in all the circumstances "to see that the visitor will be reasonably safe,"[44] and a warning will be sufficient if "it was enough to enable the visitor to be reasonably safe."[45] If, therefore, an occupier has taken such steps or given such warning as would enable a reasonable man to be safe from injury, it would seem that he has discharged his duty in every case and that the effect of a visitor's failing to avoid injury through negligence on his part (as, for example, where he does not notice the warning) will be to defeat his claim entirely. And yet it is well established in ordinary liability for negligence that a reasonably prudent man must often foresee and guard against the failure of others to take reasonable care for themselves, and is not, for example, entitled to drive a motor-vehicle on the assumption that all other users of the highway will exercise reasonable care at all times.[46] If the draftsman had been less prolix and had simply provided that an occupier should take reasonable care to prevent injury to his visitors, these doubts could not have arisen. Even so, it may be doubted whether the courts will apply other than general principles in deciding whether a claim under the new Act is defeated wholly or in part by the contributory negligence of the plaintiff.

Liability for Current Operations

There is support for the view that the common law distinction between invitees and licensees did not apply to a claim by a visitor

[42] For a discussion of the question, see Williams, *Joint Torts and Contributory Negligence* (1951), pp. 319-324; Street, *Law of Torts* (1955), p. 203.

[43] Express provision for the defence of assumption of risk may have been thought necessary because of the rule that *volenti non fit injuria* is no defence to an action for breach of statutory duty; *Wheeler* v. *New Merton Board Mills, Ltd.* [1933] 2 K.B. 669; *Alford* v. *N. C. B.* [1952] 1 All E.R. 754, 757.

[44] s. 2 (2).

[45] s. 2 (4) (*a*).

[46] *Grant* v. *Sun Shipping Co., Ltd.* [1948] A.C. 549, 567; *L. P. T. B.* v. *Upson* [1949] A.C. 155, 173.

injured by current operations carried on by an occupier, or by anyone else, on the premises, but applied only to a claim for injuries caused by the static condition of the premises.[47] Liability for injuries caused by current operations was governed by ordinary principles of negligence.[48]

Section 1 (1) of the Act provides that the rules enacted shall regulate the duty which an occupier owes to his visitors " in respect of dangers due to the state of the premises or to things done or omitted to be done on them," and some have concluded that the Act has therefore abolished the distinction between the duty owed in respect of the static condition of premises and the duty owed in respect of current operations.[49] But other parts of the Act lead one to doubt whether the common duty of care is imposed on an occupier except in circumstances where the common law distinction between invitees and licensees would have been relevant. Thus, the rules enacted are to have effect " in place of the rules of the common law," [50] and " shall regulate the nature of the duty imposed by law in consequence of a person's occupation or control of premises." [51] The duty imposed on an occupier in respect of current operations, however, is imposed on him by reason of his activity rather than in consequence of his occupation. The same duty would attach to any other person who carried out the operations on the land. Moreover, section 1 (3) of the Act, which extends its operation to movable structures and damage to property, expressly provides that the rules enacted shall apply in such cases " in like manner and to the like extent as the principles applicable at common law to an occupier of premises and his invitees or licensees would apply " to regulate the obligations of an occupier. The better view probably is therefore that the common duty of care does not govern liability for current operations.

Excluding Liability to Persons who Enter Premises Under a Contract Though as Strangers to it

The ordinary common law rule appears to be that an exemption clause in a contract for the use of premises prevails against all persons who make use of the premises under the contract, whether or not they are parties to it.[52] The Law Reform Committee thought it anomalous that there should be a class of persons whose rights

47 *Dunster* v. *Abbott* [1953] 2 All E.R. 1572; *Slade* v. *Battersea Hospital Management Committee* [1955] 1 All E.R. 429; *Slater* v. *Clay Cross Co., Ltd.* [1956] 2 Q.B. 264.

48 See Street, *op. cit.*, pp. 193–197; Odgers (1957) Camb.L.J. 49–54.

49 *e.g.*, Salmond, *op. cit.*, p. 481.

50 s. 1 (1).

51 s. 1 (2).

52 *Fosbroke-Hobbes* v. *Airwork, Ltd.* [1937] 1 All E.R. 108, 112. This was the view of the Law Reform Committee: Cmd. 9305, p. 24. See, however, the doubts expressed by Denning L.J. in *White* v. *John Warwick & Co., Ltd.* [1953] 2 All E.R. 1021, at pp. 1025–1026.

under the general law should be capable of being limited by contractual provisions of which they may be unaware.[53] Following the Committee's recommendations, section 3 (1) of the Act provides that where an occupier is bound by contract to permit persons who are strangers to the contract [54] to enter his premises "the duty of care which he owes to them as his visitors cannot be restricted or excluded by that contract, but (subject to any provision of the contract to the contrary) shall include the duty to perform his obligations under the contract, whether undertaken for their protection or not, in so far as those obligations go beyond the obligations otherwise involved in that duty." [55]

The effect of this section is that the lessor of a block of flats or offices, who retains control of the common stairs, lifts and passages leading to them, cannot, by any term of the leases on which the flats or offices are let, exclude his liability for injuries suffered by a guest or visitor of one of his tenants while using the means of access, even though he has effectively excluded his liability to the tenant himself. If he has undertaken by lease or has imposed on him by statute [56] some higher obligation than would ordinarily be required by the common duty of care, the tenant's visitors as well as the tenant himself will be able to invoke this higher duty unless the lease provides that its benefit shall be confined to the tenant.[57] The position of persons injured in circumstances like *Fairman* v. *Perpetual Investment Building Society* [58] and *Jacobs* v. *L. C. C.*[59] has thus been vastly improved.

Though an occupier cannot, by virtue of section 3, exclude his liability to a stranger to the contract by any term of the contract, it would seem, on the authority of *Ashdown* v. *Samuel Williams & Sons, Ltd.*,[60] that he can still exclude his liability to such a person by displaying an adequate notice disclaiming liability at the entrance of the premises. That he should be able to do by a notice what

53 Cmd. 9305, p. 24.

54 "Stranger to the contract" is defined by section 3 (3) as "a person not for the time being entitled to the benefit of the contract as a party to it or as the successor by assignment or otherwise of a party to it, and accordingly includes a party to the contract who has ceased to be so entitled."

55 But an occupier who has taken all reasonable care is not to be answerable to strangers to the contract for dangers due to the faulty execution of any work of construction, maintenance or repair by persons other than himself, his servants and persons acting under his direction and control, unless the contract expressly so provides: s. 3 (2).

56 "Where by the terms or conditions governing any tenancy (including a statutory tenancy which does not in law amount to a tenancy) either the landlord or the tenant is bound, though not by contract, to permit persons to enter or use premises of which he is the occupier, this section shall apply as if the tenancy were a contract between the landlord and the tenant": s. 3 (4).

57 s. 3 applies to contracts and tenancies entered into before as well as after the commencement of the Act, but, if entered into before the commencement of the Act, not so as to enlarge the duty owed by an occupier beyond the common duty of care: s. 3 (5).

58 [1923] A.C. 74.

59 [1950] A.C. 361.

60 [1957] 1 Q.B. 409.

he cannot by an express term of the contract is not as bizarre as it might seem at first sight, for a visitor will or may be expected to know of the notice, whereas, being a stranger to the contract under which he enters, he may not be aware that the occupier has sought by the contract to exclude his liability. As we have seen, it was because the Law Reform Committee thought it unjust that a visitor should be bound by a contractual provision which he might not know of that they recommended that the law should be changed.

Landlord's Liability to Persons Lawfully on Premises Demised by Him

At common law a landlord was never liable, other than to the tenant himself, for injuries sustained by any person lawfully on the demised premises through the breach of his obligation to maintain or repair the premises, and this was so whether the obligation arose from a lease or was imposed by statute. The remedy, if any, of the injured person was against the tenant alone, as occupier of the premises. In the usual case, however, if an action lay against the tenant, the tenant could recover from the landlord, as the measure of the damage flowing from the breach of the latter's obligations, the amount of his liability in damages to the injured person. But this circuitous form of recovery from the landlord was not available if, for example, the injured person happened to be the wife of the tenant and so unable to sue him in tort.[61]

The Law Reform Committee, not unnaturally, thought it unsatisfactory that a landlord's ultimate liability in such cases should necessitate such circuity of action and be dependent on such accidents as whether the injured person can sue the tenant in tort.[62] Following the Committee's recommendations, therefore, section 4 (1) of the Act provides that " where premises are occupied by any person under a tenancy which puts on the landlord an obligation [63] to that person for the maintenance or repair of the premises, the landlord shall owe to all persons who or whose goods may from time to time be lawfully on the premises the same duty, in respect of dangers arising from any default by him in carrying out that obligation, as if he were an occupier of the premises and those persons or their goods were there by his invitation or permission (but without any contract)." Where premises are occupied under a sub-tenancy, the same duty is owed by any landlord on whom an obligation to repair is put by the sub-tenancy, as well as by any superior landlord on whom a like obligation is put by the mesne landlord's tenancy.[64] Persons or goods are not to be deemed to

[61] *Cavalier* v. *Pope* [1906] A.C. 428.
[62] Cmd. 9305, pp. 37–39.
[63] Obligations imposed by any enactment in virtue of a tenancy are to be treated as imposed by the tenancy, and " tenancy " includes a statutory tenancy which does not in law amount to a tenancy and also any contract which confers a right of occupation: s. 4 (7).
[64] s. 4 (2).

be lawfully on the premises as regards a landlord, or any landlord superior to him, if their presence is due solely to a use of the premises not permitted by the tenancy granted by him (whether or not they are lawfully there as regards an inferior landlord), unless he is debarred by acquiescence or otherwise from objecting to the use in question.[65] Nor will a landlord be deemed to be in default in carrying out his obligations unless his default is actionable at the suit of the tenant.[66] This last is an important qualification, for it is well established that the obligation of a landlord to repair, and therefore the existence of a right of action against him, is dependent on his having notice of the want of repair.[67]

Section 4 thus goes some way towards assimilating the liability of a landlord for injuries caused by want of repair to persons using the demised premises to his liability in nuisance and negligence for injuries caused by want of repair to persons on adjoining property or on the highway. But important differences remain. In nuisance or negligence a landlord may be liable if, without being under any obligation to repair the premises, he has merely reserved the right, or has an implied right, to enter and do repairs.[68] And his liability in nuisance does not depend, as it does under the Act in a claim by a visitor, on his having notice of the want of repair.[69]

Liability of an Occupier for Damage to Property

Section 1 (3) of the Act provides that the rules enacted in relation to an occupier of premises and his visitors shall govern the liability of an occupier for damage to property, including the property of persons who are not themselves his visitors, "in like manner and to the like extent as the principles applicable at common law to an occupier of premises and his invitees or licensees would apply." An occupier's liability for damage to property will therefore be governed by the common duty of care only in those cases where

65 s. 4 (3).

66 s. 4 (4).

67 *Murphy* v. *Hurley* [1922] 1 A.C. 369. This rule applies equally to obligations imposed on a landlord by statute (*e.g.*, under s. 2 of the Housing Act, 1936): *McCarrick* v. *Liverpool Corporation* [1947] A.C. 219; and even though the landlord was in breach of his obligations at the beginning of the tenancy: *Uniproducts (Manchester) Ltd.* v. *Rose Furnishers, Ltd.* [1956] 1 All E.R. 146.

68 *Wilchick* v. *Marks* [1934] 2 K.B. 56; *Heap* v. *Ind Coope & Allsopp* [1940] 2 K.B. 476; *Mint* v. *Good* [1951] 1 K.B. 517.

69 *Wringe* v. *Cohen* [1940] 1 K.B. 229. There appears to be no case in which it has been sought to make a superior landlord liable in nuisance for injuries caused by a defect on premises (as he may now be liable under the Occupiers' Liability Act for injuries to a visitor). But if he has control over the state of repair of the premises by reason of an obligation or power to repair, he would seem to be liable on general principle, even though the inferior landlord has excluded his own liability by imposing an obligation to repair on the tenant. In other words, it would not be necessary in an action of nuisance against a superior landlord to show an unbroken chain of repairing covenants, such as is required under the Act in an action by a visitor.

his liability for damage to property would have been governed by the common law rules regulating an occupier's duty.

How far the old common law rules did govern liability for damage to property has never been finally settled. It has been doubted whether they applied at all, except when the damage to property was incident to personal injury.[70] But against this view is the fact that the rule in *Indermaur* v. *Dames*[71] was often applied to regulate the liability of harbour authorities for damage suffered by ships.[72] The effect of the cases appears to be that the occupier rules applied only to claims for damage caused by the defective physical condition of premises, and not to claims for loss of the goods through any other cause, such as where goods brought on the defendant's premises are stolen by some third person.[73] In order to fix an occupier with liability for the loss of goods brought on to his premises, other than through the defective state of the premises, it was, and still will be, necessary as a general rule to show that possession of the goods passed to him[74] or that he converted the goods by acting in a manner inconsistent with the plaintiff's title to them. Car-park proprietors will therefore still enjoy the immunity of *Ashby* v. *Tolhurst*.[75]

Conclusions

Though few people would question that some reform of occupiers' liability was needed, not everyone, it is thought, will agree that the method suggested by the Law Reform Committee and adopted by the legislature was the best way of dealing with the subject.

Though there was little to be said for retaining a separate category of contractual visitors, with its attendant rules, distinct from the category of invitees, many will think that the element of material advantage to the occupier, which was the basis of the distinction between invitees and licensees, was a not inapt consideration on which to hinge different rules of liability. To the writer at least, there was nothing objectionable in the rule that the legal duty of a person who, with no prospect of material advantage and often from motives of charity, allows others to make

[70] Evershed M.R. in *Tinsley* v. *Dudley* [1951] 2 K.B. 18, at p. 25.

[71] (1866) L.R. 1 C.P. 274.

[72] *e.g.*, *The Moorcock* (1889) 14 P.D. 64; *Anchor Line (Henderson Bros.), Ltd.* v. *Dundee Harbour Trustees*, 1922 S.C. 79, 83; *The Cawood III* [1951] P. 270; *Workington Dock and Harbour Board* v. *S.S. Towerfield (Owners)* [1951] A.C. 112, 136. See also *Lax* v. *Darlington Corporation* (1879) 5 Ex.D. 28; *Norman* v. *G.W.R. Co.* [1915] 1 K.B. 584.

[73] *Tinsley* v. *Dudley* [1951] 2 K.B. 18, 31; *Edwards* v. *West Herts Group Hospital Management Committee* [1957] 1 All E.R. 541.

[74] *Cf. Ultzen* v. *Nicols* [1894] 1 Q.B. 92. Apart from the liability of innkeepers, it seems that, in special circumstances at least, a duty of care in respect of the safe custody of goods brought on their premises is owed by boarding-house keepers, independent of any question of bailment: see *Dansey* v. *Richardson* (1854) 3 E. & B. 144; *Scarborough* v. *Cosgrove* [1905] 2 K.B. 805.

[75] [1937] 2 K.B. 242. *Cf. Tinsley* v. *Dudley* [1951] 2 K.B. 18; *Halbauer* v. *Brighton Corporation* [1954] 1 W.L.R. 1161.

use of his land was limited to warning them of (or, if they are too young to heed a warning, guarding them from) dangers actually known to him. The view of the Law Reform Committee that the element of advantage to the occupier should on principle be irrelevant to his liability has already been criticised.[76] The cases which have excited dissatisfaction in recent years with the limited liability of an occupier to his licensees, and in which the courts have sometimes stretched the law in order to hold defendants liable, have all been either claims against local authorities by persons injured on premises provided for the use of the public or actions by a visitor or guest of a tenant against the landlord in respect of some defect in the stairs, lifts or passages retained by him.[77] To regard these two classes of visitor as mere licensees was always disputable, and they could have been dealt with, as Mr. Diplock, Q.C., suggested in his minority report,[78] by promoting them to the category of invitees, without abolishing the distinction between invitees and licensees entirely.

The Committee made much of the supposedly ludicrous operation of the distinction between invitees and licensees in borderline cases, according to which, as they pointed out, a visitor might be a mere licensee on his way into premises but an invitee on his way out. The rational basis of a distinction which led to such refinements was, they thought, open to suspicion.[79] But there are few legal distinctions and categories that cannot, to the untutored mind at least, be made to appear ludicrous in borderline cases. To cause the death of a person is not murder unless the death occurs within a year and a day of the injury, and yet few would suggest that there should not be some fixed, and therefore arbitrary, limitation in such a case. A legal system must, in the nature of things, create and impose its own comparatively rigid categories on the phenomena which it seeks to control, and the seemingly arbitrary operation of them in borderline cases is the price one has to pay for some degree of legal certainty and for the exclusion of bias in the judicial process. One is reminded of the saying of Chitty that "Courts of Justice ought not be puzzled by such old scholastic questions as to where a horse's tail begins and where it ceases. You are obliged to say, 'This is a horse's tail' at some time." The merit of a distinction giving rise to different rules of liability should be judged by its operation in the ordinary, average case, and not by its application in the rare cases which fall on the borderline.

It is fashionable nowadays to deprecate "mechanical jurisprudence," of which the common law categories of visitor have

[76] Above, p. 363. Cmd. 9305, p. 25.

[77] *Coates* v. *Rawtenstall Corporation* [1937] 3 All E.R. 602; *Ellis* v. *Fulham B. C.* [1938] 1 K.B. 212; *Baker* v. *Bethnal Green B. C.* [1945] 1 All E.R. 135; *Pearson* v. *Lambeth B. C.* [1950] 2 K.B. 253; *Jacobs* v. *L. C. C.* [1950] A.C. 361; *Hawkins* v. *Coulsdon & Purley U. D. C.* [1954] 1 Q.B. 319.

[78] Cmd. 9305, p. 44.

[79] *Ibid.*, p. 28.

often been cited as an example, and to favour an enlargement of judicial discretion by the formulation of broad standards to do "justice" in the particular case. This tendency is often to be welcomed, particularly where the rigid categories of the old law owe their existence merely to the accidents of legal history or have given rise to a wealth of subtleties and refinements disproportionate to any practical gain in legal certainty. But the critics of mechanical jurisprudence appear sometimes to forget that a legal system has the practical function of resolving and preventing disputes and to place a pathetic trust in the infallibility of judicial discretion. Justice is not an absolute, given to all of us, or even to all judges, to see alike. If rules are required to control the vagaries of juries, so too are they required to limit the discretion of judges.

The greater the discretion conferred on the court, the more uncertain the outcome of a case will be, and therefore the higher will be the proportion of cases that go to trial instead of being settled out of court. This is a doubtful gain, except from the point of view of the practising lawyer. Moreover, if the trial is by a judge alone, as is usual, the greater the discretion conferred on him, the more encouragement there is for appeals from his judgment. The reports of recent years contain many cases in which appeal courts have reviewed the question whether the defendant took reasonable care in all the circumstances of the case, sometimes with a remarkable lack of unanimity of opinion.[80] The interpretation of the common duty of care now imposed on occupiers is bound to add to the number of these appeals.[81]

It may be, as Mr. Diplock, Q.C., foresaw, that the courts will, in course of time, lay down new rules as to what constitutes compliance with the common duty of care in different situations, and by so doing make the outcome of cases more predictable and limit the scope for appeals. But if this happens, we shall return again, after a long and expensive travail of cases, to "mechanical jurisprudence," and the prospect can hardly be put forward as a justification for the complete abolition of the old common law categories.

Douglas Payne.*

[80] Several of these appeals involving questions of fact have been carried to the House of Lords: see, for example, *Caminer* v. *Northern & London Investment Trust* [1951] A.C. 88; *Bolton* v. *Stone* [1951] A.C. 850; *Carmarthenshire C. C.* v. *Lewis* [1955] A.C. 549; *Morris* v. *West Hartlepool Steam Navigation Co., Ltd.* [1956] A.C. 552.

[81] The tendency to appeal on questions of fact is likely to be encouraged by the recent decision of the House of Lords in *Benmax* v. *Austin Motor Co., Ltd.* [1955] A.C. 370, in which it was held that an appeal court is in as good a position as the trial judge to draw the proper inference (such as negligence) from specific facts proved or not in dispute, and should not shrink from the task.

* Lecturer in English Law, University College, London.

AUTOMATISM AND CRIMINAL RESPONSIBILITY

EXACTLY what part automatism plays in determining liability for crime in English law was regarded by Devlin J., a member of the Divisional Court, in *Hill* v. *Baxter* [1] as still "a novel point," the answer to which depended on whether or not the temporary loss of consciousness was attributable to a disease of the mind within the M'Naughten Rules and also on the nature of the liability which the prosecution has to establish. The learned judge's excursus into the ambit of automatism in criminal law and its impact on the related question of the burden of proof, though unnecessary in view of the Divisional Court's finding that the evidence fell far short of what would justify a court holding that the respondent was in some automatous state at the time of the alleged offence, is notable for its analysis of basic principles. Although careful to avoid making categorical pronouncements on matters still awaiting decision by an appellate court, Devlin J. has done enough to indicate the need for more intensive study of the dual problems indicated above.[2] This need is accentuated by examination of the separate judgments delivered by Lord Goddard C.J. and Pearson J., the other members of the court.

In the case before the court two informations had been preferred against the respondent, the first for dangerous driving contrary to the Road Traffic Act, 1930, s. 11 (1), and the second for failing to conform to a "Halt" sign contrary to section 49 (*b*) of the same statute. At the hearing in the magistrates' court the justices had accepted the respondent's evidence that he remembered nothing of events leading up to the accident in which he was involved until he was found by the police in a dazed condition. Both informations were dismissed by the magistrates on the ground that the respondent was not conscious of what he was doing at the time the accident occurred "with the implication that he was not capable of forming any intention as to his manner of driving." [3] Although criticising

[1] [1958] 1 Q.B. 277; [1958] 2 W.L.R. 76; [1958] 1 All E.R. 193.

[2] Hitherto, scant attention has been accorded the subject by English text-writers. See, for example, Clark, *Analysis of Criminal Liability*, pp. 24–28; Stroud, *Mens Rea*, pp. 26, 193–195; Russell on *Crime* (10th ed.), pp. 29–30; Kenny, *Outlines of Criminal Law* (15th ed.), p. 64; (16th ed., by Turner), pp. 23–24; Cross and Jones, *Introduction to Criminal Law* (3rd ed.), pp. 35–36; Archbold, *Pleading and Practice* (33rd ed.), although there is no discussion in the text, the recent cases on the subject are noted in the Cumulative Supplement under the headings "Evidence" and "Tests of Insanity"; Macdonald, *Criminal Law of Scotland* (5th ed.), p. 11; Stephen, *History of the Criminal Law*, Vol. 2, pp. 100, 101 and 169, but there is no reference to the subject in Stephen's *Digest of the Criminal Law*. For the fullest treatment, see Glanville Williams, *Criminal Law, The General Part*, pp. 10–18, 316–323, 363.

[3] [1958] 1 Q.B. at p. 281.

the admission in evidence by the lower court of two letters written by a doctor who had carried out encephalogram tests on the respondent, all three members of the Divisional Court appear to have attached great importance to the fact that the same reports provided no corroboration of the respondent's explanation of the accident.[4] In view of the absence of any medical evidence substantiating the plea of a "black-out" the court allowed the appeal and remitted the case to the magistrates' court with a direction to convict the respondent.

That the views of the Divisional Court are to be regarded, therefore, as only *obiter dicta* should not in any way minimise the importance of the judgments in *Hill* v. *Baxter*. Surprising though it may seem, the present case is the first occasion in which an English appellate court has considered the implications of a defence of automatism.[5] The subject is, of course, not entirely new to English law[6] and in recent years seemingly conflicting directions as to the scope of the defence in criminal cases have been given by judges on assize. That such a conflict is capable of ready explanation is one of the useful purposes served by the present case. In the earlier of the assize cases, *R.* v. *Charlson* (1955),[7] the accused had violently assaulted his young son, to whom he was devoted, with a wooden mallet and had picked him up and thrown him out of the window. The boy had fallen twenty-five feet into the river below, incurring severe injuries to his leg and arm. When interviewed by the police the accused admitted striking his son but said that he did not know why he had done so. No plea of insanity was made by the defence and in the opinion of the prison medical officer the accused was not suffering from any disease of the mind at the time of his assault upon the boy. The same prison doctor stated that clinical examination of the accused and the medical history of the family pointed to the possibility of the accused suffering from a cerebral tumour, in which case he would be liable to a motiveless outburst of impulsive violence over which he would have no control at all.

[4] *Ibid.*, pp. 281–282.

[5] As explained later, the case of *R.* v. *Harrison-Owen* [1951] 2 All E.R. 726, which came before the Court of Criminal Appeal, was concerned principally with the admissibility of evidence.

[6] See Hale, *Pleas of the Crown*, i, 434; *Smith* v. *Stone* (1647) Sty. 65; *R.* v. *Chetwynd*, *The Times*, November 4, 1912 (cited in Stroud, *Mens Rea*, 194), in which Scrutton J. expressed himself forcibly on what he described as "double consciousness"; *R.* v. *Perry* (1919) 14 Cr.App.R. at pp. 51, 55; *National Coal Board* v. *Evans* [1951] 2 K.B. at p. 880, *per* Morris L.J., citing *Weaver* v. *Ward* (1607) Hob. 134; *White* v. *White* [1950] P. 39, at p. 52, *per* Asquith L.J.; *Morris* v. *Marsden* [1952] 1 All E.R. 925, at p. 927, *per* Stable J.; *R.* v. *Attrill*, *Daily Mail*, July 20, 1948, *per* Humphreys J.

[7] [1955] 1 W.L.R. 317; [1955] 1 All E.R. 859; (1955) 39 Cr.App.R. 37. In view of the decision in this case alone it is difficult to understand the statement attributed to Lord Goddard C.J. that: "there was in fact no case in either English or Scottish law where a defence of automatism had been set up or been the subject of judicial decision" (*The Times*, December 20, 1957).

Barry J., in a meticulous and admirable direction to the jury, explained the constituent elements in the three charges against the accused, *viz.*, (1) causing grievous bodily harm with intent to murder,[8] (2) causing grievous bodily harm with intent to do grievous bodily harm,[9] and (3) causing grievous bodily harm,[10] without any specific allegation as to his intention. Whereas in the first two charges a specific intent had to be established, in relation to the third charge, the learned judge explained, the jury did not need to trouble themselves with questions of intention. The question common to all three charges, Barry J. declared, was "whether the accused knew what he was doing when he struck those blows. If he struck his son with the mallet, knowing what he was doing, and by those blows caused the injuries, then he is guilty of the third charge. If he did not know what he was doing, if his actions were purely automatic and his mind had no control over the movements of his limbs, if he was in the same position as a person in an epileptic fit then no responsibility rests upon him at all, and the proper verdict is 'Not guilty' of all the three charges."[11] The jury acquitted the accused on all three counts and he was accordingly discharged.

The narrow boundary line which separates, on the one hand, cases of unconsciousness at the time of the offence and resulting in a complete acquittal and, on the other hand, a similar state resulting in a finding of "guilty but insane" with consequent committal to a Broadmoor institution, was demarcated by Devlin J. in *R.* v. *Kemp* (1956),[12] a case heard at the Bristol Assizes. In that case the accused, an elderly man of unblemished character, had struck his wife on the head with a hammer inflicting serious injury. He was charged with causing grievous bodily harm.[13] All the evidence pointed to the assault being entirely motiveless and irrational. It was shown that the accused suffered from a physical disease, namely arteriosclerosis, or hardening of the arteries, and all the medical witnesses were agreed that, at the time of the offence, the accused did not know what he was doing. However, whilst agreed as to the accused's having been labouring under a defect of reason at the time of the offence, a marked division of opinion manifested itself as to whether or not this defect was brought about by a disease of the mind within the meaning of the M'Naughten Rules. According to the defence a disease of the mind was confined to diseases which are functional in origin, such as melancholia and schizophrenia, whereas the prosecution contended that mental disease included also diseases which have an organic origin and are traceable to some physical derangement, such as arteriosclerosis.

[8] Offences against the Person Act, 1861, s. 11.
[9] *Ibid.*, s. 18.
[10] *Ibid.*, s. 20.
[11] [1955] 1 W.L.R. at p. 325.
[12] [1957] 1 Q.B. 399; [1956] 3 W.L.R. 724; [1956] 3 All E.R. 249; (1956) 40 Cr.App.R. 121. For notes on this decision, see (1957) 73 L.Q.R. 12; Hall-Williams, (1957) 20 M.L.R. 55, and Griew, [1957] Crim.L.R. at pp. 525–526.
[13] Offences against the Person Act, 1861, s. 20.

The trial judge, Devlin J., was not impressed with the above classification which he regarded as irrelevant for the purposes of the law, which, he added, "is not concerned with the origin of the disease or the cause of it but simply with the mental condition which has brought about the act." [14] Following the learned judge's direction that, on the whole of the medical evidence, they ought to find that the accused was labouring from a defect of reason caused by a disease of the mind within the meaning of the M'Naughten Rules, the jury returned a verdict of guilty but insane.

What would seem, therefore, on outwardly similar facts, to be conflicting rulings as to the degree of criminal responsibility where the accused is incapable of knowing what he was doing, are, in fact, explicable on the basis that whereas in *Charlson* the medical evidence was agreed that no question arose of the accused suffering from a disease of the mind, in *Kemp*, notwithstanding the acute conflict as to the exact boundaries of a disease of the mind, the medical evidence adduced in that case led to the inescapable conclusion that arteriosclerosis is a disease which is capable of affecting the mind in such a way as to cause a defect, temporarily or permanently, of the reason and understanding. One further point of difference, not adverted to by Devlin J. in distinguishing the issue in *Kemp* from that presented before Barry J. in *Charlson*, and which will be enlarged upon later, concerns the initial criterion applied in both cases. Whereas in *Kemp* the emphasis was placed on the hardening of the arteries having prevented the accused from knowing the nature and quality of the act he was doing,[15] in other words, as having caused a defect of the understanding, in *Charlson* the broader approach was followed by Barry J., who directed the jury that no responsibility would be incurred, first, "if the accused did not know what he was doing," [16] secondly, "if his actions were entirely automatic and his mind had no control over the movements of his limbs." [16] It is not clear whether the learned judge intended these criteria to be considered as alternatives or as merely different formulas for expressing the same condition. For the moment it may be suggested that the establishment of either condition will suffice to render the accused's conduct involuntary.

An earlier instance in which the defence of automatism was set up, *R.* v. *Harrison-Owen* (1951),[17] is not particularly helpful since it was concerned principally with the admissibility of evidence. In view of the prisoner's defence to the charge of burglary that his walking into the house was the act of an automaton, the question arose whether the prosecution, with a view to rebutting this defence, could rightly cross-examine the prisoner regarding his previous convictions. Distinguishing between a defence of accident, in which

[14] [1957] 1 Q.B. at p. 407.
[15] *Ibid.*, p. 404.
[16] [1955] 1 W.L.R. at p. 325.
[17] [1951] 2 All E.R. 726; W.N. 483; 115 J.P. 545.

case evidence of similar facts could be adduced, and the present defence of lack of intention the Court of Criminal Appeal held that such cross-examination was not permissible. This distinction has not passed unchallenged so far as the admissibility of evidence is concerned,[18] and is, moreover, of dubious validity in explaining the true character of a plea of automatism.[19] The term " accident " is, at best, a nebulous concept [20] and it is worth noting that at the conclusion of his judgment Lord Goddard C.J. chose to define the defence on the more expansive and less contentious ground that automatism caused the act proved against the accused to be not a voluntary but an unintentional act.[21]

In thus relating a state of automatism to the physical element of crime the Lord Chief Justice was in fact addressing himself to the fundamental requirement of all criminal liability, whether the offence is one of absolute prohibition or one involving proof of a guilty mind and whether statutory or common law in origin.[22]

[18] See Carter and Cowen, *Essays in the Law of Evidence*, pp. 111–114, and Cross, *Evidence*, pp. 287–288, who compares the decision with that given in *R.* v. *Mortimer* (1936) 25 Cr.App.R. 150.

[19] See Glanville Williams, *The General Part*, p. 14.

[20] *e.g.*, see *R.* v. *Jarmain* [1946] K.B. 74, at p. 80; *R.* v. *Davies* (1913) 29 T.L.R. 350; *Horton* v. *Gwynne* [1921] 2 K.B. 661, at p. 662; *Woolmington* v. *D. P. P.* [1935] A.C. 462, at p. 479; *R.* v. *Charlson* [1955] 1 W.L.R. 317, at p. 320.

[21] [1951] 2 All E.R. at p. 728.

[22] Usually stated as the " voluntary act " requirement, it appears, for example, in the classic pronouncement of the House of Lords in *Woolmington* v. *D. P. P.* [1935] A.C. 462, at p. 482, and, more recently, in *R.* v. *Vickers* [1957] 2 Q.B. 664, at p. 672. On this general question, see the American Law Institute's *Model Penal Code, Tentative Draft No. 4*, Art. 2, s. 2.0 (1) and (2) which provides:

" (1) A person is not guilty of an offence unless his liability is based on conduct which includes a voluntary act or the omission to perform an act which it was physically impossible to perform.

(2) The following are not voluntary acts within the meaning of this section:

(a) a reflex or convulsion;

(b) a bodily movement during unconsciousness [coma?] (*sic*) or sleep;

(c) conduct during hypnosis or resulting from hypnotic suggestion;

(d) a bodily movement that otherwise is not a product of the effort or determination of the actor, either conscious or habitual;"

For the supporting commentary, see *ibid.*, pp. 119–122. To this principle that all criminal liability is based on proof that the accused's " act " was voluntary, *R.* v. *Larsonneur* (1933) 24 Cr.App.R. 74; 97 J.P. 206, has long been cited as the solitary exception in English law. Recently come to light is a Northern Ireland case, *Kasriel Neumann* (1947) (unreported). Almost exactly parallel to the circumstances evidenced in *Larsonneur*, the decision in which was relied upon by the Crown, the applicant in *Neumann* sought unsuccessfully to contest a deportation order by habeas corpus proceedings before Lowry J., and, later, the Court of Appeal in Northern Ireland. The case is referred to in (1956) 12 N.I.L.Q. at p. 61, and the writer acknowledges his indebtedness to the Chief Crown Solicitor of Northern Ireland for being allowed access to the papers in the case. See, too, *O'Sullivan* v. *Fisher*, 1954 S.R.(S.A.) 33, in which case the police entering private premises on other business strongly urged the respondent, who had been drinking heavily, to accompany them outside. When he reached the street the police arrested the respondent and subsequently charged him with being " unlawfully drunk in a public place." The South Australian Supreme Court refused to disturb the

This requirement, stated in its simplest form, is that the "act" of the accused, in the sense of a muscular movement, must be willed.[23] It must be a voluntary expression of the accused's will and it has long been recognised that bodily movements resulting from a reflex, *e.g.*, coughing or the so-called "instinctive" movements of a person warding off an attack,[24] or convulsions, *e.g.*, the convulsive movements of an epileptic,[25] are not acts in the strict sense of the word. Such reflex and convulsive movements denote a complete absence of the exercise of the will and are distinguishable from a post-epileptic condition in which the epileptic performs actions of which he is entirely unconscious.[26] By this one does not mean being in a state of coma but simply a person's inability to know what he is doing. A similar explanation is advanced in cases where the accused is said to have been suffering from hypoglycaemia,[27] or low blood sugar-content, or where he gesticulates in a troubled dream or walks in his sleep.[28] Doubts, on the other hand, still exist as to the true character of bodily activity under the control of hypnotic or post-hypnotic suggestion.[29] The fact that a person

conviction. Reed J., in holding that it was not necessary for the prosecution to prove that the accused intended to be in a public place, acknowledged, nevertheless, that proof that a person was compelled by physical force to go into a public place would afford an answer to the particular charge.

23 Holmes, *The Common Law*, 54, 91; *cf.* Hall, *Principles of Criminal Law*, pp. 252–255, 522; Salmond, *Jurisprudence* (10th ed.), p. 369; Williams, *The General Part*, pp. 10, 16. See, too, Perkins, "Rationale of Mens Rea," 52 Harv.L.R. at pp. 912–913; Cook, "Act, Intention and Motive in the Criminal Law" (1917) 26 Yale L.J. 645, at pp. 646–649.

24 See *R.* v. *Charlson* [1955] 1 W.L.R. at pp. 319–320.

25 *e.g.*, see *Restatement of Torts*, Vol. 1, s. 2; Hall, *Principles of the Criminal Law*, p. 388; 68 Jo. of Crim.Law 297; and *White* v. *White* [1950] P. 39, at p. 52, *per* Asquith L.J. in relation to a petition for divorce based upon cruelty.

26 A useful summary of the various manifestations of epilepsy, their definition and relationship to criminal responsibility, is given in the Report of the Royal Commission on Capital Punishment (Cmd. 8932), pp. 133–135. For two apparently conflicting rulings by Canadian courts on the availability of unconsciousness as a general defence, see *R.* v. *Kasperek* (1951) 101 Can.C.C. 375, and *R.* v. *Minor* (1955) 15 W.W.R.(N.S.) 433.

27 *e.g.*, see *R.* v. *Horton, Manchester Guardian*, July 20, 1951; *R.* v. *Martin, The Times*, October 25, 1957; and the interesting case referred to by Lord Goddard C.J. in his paper, "The Working of the Court of Criminal Appeal" (1952) 2 J.S.P.T.L.(N.S.) No. 1 at p. 7. For a case, notable in many respects, in which the defence of hypoglycaemia coupled with that of schizophrenia resulted in a finding of "guilty but insane," see *R.* v. *Gordon*, Northern Ireland Winter Assize, *Belfast Telegraph*, March 6, 7, 1953.

28 Stephen, *History of the Criminal Law*, Vol. 2, p. 100; *Morris* v. *Marsden* [1952] 1 All E.R. 925, at p. 927, *per* Stable J. For a recent South African decision involving a killing while under the influence of a nightmare, see *R.* v. *Dhlamini*, 1955 (1) S.A.L.R. 120, in which the Supreme Court, Transvaal Provincial Division, held that the accused "acted involuntarily without intention" and did not know what he was doing when he killed the deceased. For a different interpretation of this decision, see [1955] Crim.L.R. 708–709, which draws the analogy with *H.M. Advocate* v. *Fraser* (1878) 4 Couper 70, in which the accused killed his child during sleep thinking he was struggling with a wild tiger and was acquitted on the grounds of mistake. For other recent unreported decisions, see Williams, *The General Part*, p. 11, n. 4.

29 See White, *The Abnormal Personality* (1948), pp. 204–207; Stroud, *Mens Rea*, pp. 26 and 257. For the French and German attitudes, see Glanville Williams, *The General Part*, p. 12, who suggests that the preferable view is that the

is induced by threats of physical violence, however overwhelming, to will a bodily movement does not render it involuntary and, therefore, not his act.[30] Although not infrequently the cause of confusion, such duress is clearly distinguishable from compulsion by human agency as where A takes B's hand and with it strikes C, in which case the act of striking is not regarded as B's act, B's will not having functioned at all.[31]

To revert to the situation portrayed in *Hill* v. *Baxter*, as in the case of *Charlson* the question of insanity did not arise for consideration. Fortunately, therefore, the judgments delivered by the members of the Divisional Court may be examined without the complication of analysing automatism which has originated from a disease of the mind. Pearson J. summarised the issue neatly by saying[32]: "On the facts of this case if [the respondent] was driving at all he was unquestionably driving dangerously, and therefore the question at issue was and is whether he was driving the van." In somewhat more ambiguous language Lord Goddard C.J. addressed himself to the same essential point. "The first thing to be remembered," said the Lord Chief Justice,[33] "is that the statute contains an absolute prohibition against driving dangerously or ignoring 'Halt' signs. No question of *mens rea* enters into the offence; it is no answer to a charge under those sections to say 'I did not mean to drive dangerously' or 'I did not notice the "Halt" sign.' The justices' finding that the respondent was not capable of forming any intention as to the manner of driving is really immaterial."

Related as these opinions are to the circumstances existing at the time of the accident, it is evident that the distinction drawn between the two elements constituting the offence of dangerous driving is a valid and pertinent one. Thus, whereas the *act of driving*, of controlling the steering wheel, etc., involves proof of volition, the absence of which completely negatives criminal responsibility,[34] the *manner of driving* is judged objectively by

hypnotised subject performs an act and is legally responsible, his condition going only to the question of punishment. The contrary opinion is maintained in the A.L.I.'s *Model Penal Code*, Commentary to *Tentative Draft No. 4*, p. 122, which states: "The view that the hypnotised subject will not follow suggestions which are repugnant to him does not suffice . . . to warrant treating his conduct as voluntary: his dependency and helplessness are too pronounced."

30 Stephen, *H.C.L.*, Vol. 2, p. 102; Hall, *Principles of Criminal Law*, pp. 381, 384–386.

31 This typical example of compulsion by human agency is given by Hale, 1 P.C. 434. See, too, *Gibbons* v. *Pepper*, 1 Ld.Raym. 38, and the examples given in East, 1 P.C. 225 and in *Weaver* v. *Ward* (1607) Hob. 134.

32 [1958] 1 Q.B. at p. 286.

33 *Ibid.*, p. 282.

34 Hypothetical examples, illustrating such a contingency, and cited in *Hill* v. *Baxter* by both Lord Goddard C.J. and Pearson J., had previously been suggested by Humphreys J. in *Kay* v. *Butterworth* (1945) 110 J.P. 75. They include a blow on the head from a stone, an attack by a swarm of bees, a stroke or an epileptic fit. For an example of the latter, see *People* v. *Freeman*, 61 Cal.App. 2d. 110, 142 P. 2d. 435 (1943), referred to in "Legal Problems of Epilepsy" (1956) 29 Temple L.Q. 373–375. See, too, *Ryan* v. *Youngs*

reference to the somewhat elastic standard of driving by a reasonably careful motorist in similar circumstances.[35] When the manner of driving is in issue, the accused's advertence to the potential dangers which might arise from his driving, *i.e.*, the subjective intention of the accused, is irrelevant. This being so, it follows that the defence of automatism has no bearing on the manner of driving, at any rate when the charge of dangerous driving is related to the moment when the accident occurred. As, however, at least one member of the Divisional Court conceived, namely, Pearson J., the charge of dangerous driving might well be related instead to a stage earlier in point of time than the actual accident, during which period the accused was in full control of all his faculties and, though aware from symptoms accompanying earlier attacks of, say, epileptic fits, that a recurrence was imminent, nevertheless continues to drive. In these circumstances the proper course might be to substantiate a charge of dangerous driving not by reference to the accused's conduct immediately preceding, and resulting in, the accident, but rather on his entire behaviour in driving with due warning of what might happen if he again becomes the victim of an epileptic fit. Such heedlessness might suitably be regarded as a wide departure from the norm of a reasonable man's behaviour.[36] In thus basing the prosecution's case on the accused's entire behaviour, undue emphasis on the specific conduct which resulted in the accident would be avoided. If, as is suggested, this approach is tenable, the imposition of liability would not be affected by the fact that the voluntary " act " of driving would precede the negligence which would be relied upon as fulfilling the condition of liability embodied in the epithet " dangerous."

Some reference must be made at this stage to Devlin J.'s general

[1938] 1 All E.R. 522, a civil case which the Lord Chief Justice might have had in mind in *Hill* v. *Baxter* when introducing the notion of " act of God " into the criminal law.

35 The writer's italics. See J. C. Smith, [1957] Crim.L.R. 407 and 469, and generally, Davies, *Law of Road Traffic*, pp. 128 *et seq.*

36 Authority supporting this proposition is to be found in the decision of the Divisional Court in *Kay* v. *Butterworth* (1945) 173 L.T. 191, in which case a driver, while returning after working a night-shift in a factory, was overcome by sleep and drove his car into a party of soldiers. The driver was charged with dangerous driving (Road Traffic Act, 1930, s. 11) and careless driving (*ibid.*, s. 12). On the appeal by case stated against the acquittal, Humphreys J. distinguished between the case of a person who, *through no fault of his own*, becomes unconscious while driving, and that of a person who must have known that drowsiness was overtaking him and yet continues to drive. (Writer's italics.) Only in the former circumstances, the Divisional Court declared, ought a driver to be exempt from criminal responsibility, and since this was not so in the case before them the court remitted the case to the justices with directions to convict. Consonant with this view are two recent majority decisions of the New York Court of Appeals—*People* v. *Decina*, 2 N.Y. 2d 133, 138 N.E. 2d 799 (1956) and *People* v. *Eckert*, 2 N.Y. 2d 126, 138 N.E. 2d 794 (1956), noted in (1957) 32 N.Y.U.L.R. pp. 1354-1355. Two cases illustrative of the " no fault of the driver " principle are *Scarth* [1945] St.R.Qd. 38 (referred to in Williams, *The General Part*, p. 97) and *H.M. Advocate* v. *Ritchie*, 1926 S.C.(J.) 45. See, too, *Fain* v. *Commonwealth* (1879) 78 Ky. 183; 39 Am.Rep. 213, which is regarded as the leading American case on the subject.

statement in *Hill* v. *Baxter* that, in determining what part automatism plays in liability for crime, one of the essential factors to be considered is the nature of the liability which the prosecution has to establish.[37] From a careful study of Devlin J.'s judgment it would seem that what the learned judge had in mind was whether the crime depended on "full proof of *mens rea*."[38] The same doctrine was also invoked by Lord Goddard C.J., who emphasised that the particular charges in *Hill* v. *Baxter* concerned offences of absolute prohibition in which no question of *mens rea* was involved.[39] It is to be hoped that before any appellate court makes any further pronouncement on the availability of automatism as a defence, some preliminary thought is given to the consequences which acceptance of the principle that automatism only applies to crimes requiring *mens rea* would entail. Attention has already been drawn to the description of conduct performed in a state of automatism as acts which are not intentional. It is in the inexact use of this term "intention" that the likelihood of confusion arises.[40] Thus, when learned judges, in analysing statutory offences of absolute prohibition, speak of: "The prohibitions in the Act are absolute . . . in cases of absolute prohibition *mens rea* can be supplied by the simple doing of the forbidden act,"[41] and ". . . the element of *mens rea* is not required beyond the point that the facts must show an intention on the part of the person accused to do the act forbidden,"[42] it is suggested that, in such a context, the phrase *mens rea* is used with reference to the mental element which is an amalgam of volition and consciousness and which must accompany the act in order to constitute a crime.[43] To describe this mental element of intention as *mens rea* is to invite confusion with the common law interpretation of *mens rea* as involving a guilty mind, included within which concept is the blameworthy state of mind which involves proof of a subjective foresight of the consequences of acts coupled with a desire to effect such consequences—a state of mind to which the term "intention" is also accorded. Bearing in mind the earlier analysis of automatism, it is suggested that far from being dependent on the particular crime requiring "full proof of *mens rea*" in the sense of foresight of consequences, itself by no means an essential condition of liability, the operation of automatism as a defence has a much wider scope insomuch as it is concerned to negative proof of volition and consciousness of what the accused is doing,

37 [1958] 1 Q.B. at p. 284.
38 *Loc. cit.*
39 *Ibid.*, p. 282.
40 See Sayre, "A Rationale of Mens Rea" (1939) 52 Harv.L.R. 910–912.
41 *Browning* v. *J. W. H. Watson (Rochester), Ltd.* [1953] 1 W.L.R. 1172, at p. 1176, *per* Lord Goddard C.J. *Cf.* the same judge's observation in *Hill* v. *Baxter* (*arguendo*): "Driving dangerously is absolutely prohibited so that no *mens rea* is no answer, or the doing of the act supplies the *mens rea*" (*The Times*, December 7, 1957).
42 *Cotterill* v. *Penn* [1936] 1 K.B. 53, at p. 61, *per* Lord Hewart C.J.
43 See, further, Edwards, *Mens Rea in Statutory Offences*, pp. 247–251.

both fundamental elements in establishing any form of criminal liability whether of absolute prohibition or otherwise.

There remains for comment the close affinity between automatism and insanity which Devlin J. had first considered at some length in *Kemp*[44] and which he was to revert to in *Hill* v. *Baxter*.[45] On the latter occasion, however, the learned judge was more concerned with the impact of such nexus on the question of the burden of proof,[46] a subject which the present writer hopes to discuss in a later article. Some important questions of substantive law, however, emerge from examination of the now generally accepted affinity between these two defences. They arise from the identical character of the test whether the accused knew what he was doing at the time of the crime, which is relied upon when proving a defect of reason for the purpose of invoking the M'Naughten Rules, and also as showing a state of unconsciousness for the purpose of establishing a defence of automatism. Both circumstances are concerned to prove mental irresponsibility, the essential difference, as explained by Devlin J., in both *Kemp* and *Hill* v. *Baxter*, being that in the case of insanity the defect of the understanding must originate in a disease of the mind, whereas in the defence of automatism *simpliciter* the criminal law is not concerned with any question of the disease of the mind.

Criticism directed against the present test of insanity, as embodied in the M'Naughten Rules, has rested principally on the exclusive concentration on cognition.[47] It is concerned only with a disease of the mind resulting in a defect of the reason, a disorder of a person's power of understanding, whereas, it must be remembered, automatism as a basis of mental irresponsibility has a more extensive operation. Assuming that the origin of automatism is a disease of the mind which impairs the accused's cognitive powers, then it follows that the defence of automatism merges in the defence of insanity. If, however, the origin of the accused's state of automatism is a disease of the mind which results in a disorder of the accused's powers of volition, as in the case of irresistible impulse, so long as the M'Naughten test remains unchanged no

[44] [1957] 1 Q.B. at pp. 402–403. See, too, *R.* v. *Kumalo*, 1956 (3) S.A. 238 (N), where it was held that where evidence is led of mental disorder or defect on the part of the accused, the court should not, in the first instance, consider the defence of automatism.

[45] [1958] 1 Q.B. at pp. 284, 285. *Cf.* Lord Goddard's suggestion: "It may be that in homicide cases attention may have to be given to the matter where diminished responsibility is set up" (*ibid.*, p. 283). For a brief discussion of the problem of automatism in cases of infanticide, see Glanville Williams, *The Sanctity of Life and the Criminal Law*, p. 38, n. 1.

[46] *Ibid.*, at pp. 284–285.

[47] See Report of the Royal Commission on Capital Punishment (Cmd. 8392), pp. 79–80, 87–88, 113. Since the publication of the Report, with its recommendations, two alternative formulae to the M'Naughten test have been put forward, (1) by the Court of Appeals for the District of Columbia in *Durham* v. *United States*, 214 F. 2d 862 (1954), and (2) in the A.L.I.'s *Model Penal Code, Tentative Draft No. 4*, s. 4.01. For a critical assessment of the respective alternatives to the present law, see Weihofen's *Urge to Punish* (1957).

question can arise of a verdict of insanity.[48] The third possibility to be envisaged arises where there is no question of a disease of the mind and therefore no question of insanity. The problem to be considered here is the straightforward question whether the state of automatism is sufficient to negative the essential condition of the accused's bodily movements being voluntary. Where, it is respectfully suggested, the judgment of Devlin J. in *Hill* v. *Baxter* is somewhat misleading is in its directing the defence of automatism exclusively into the field of impairment of the cognitive processes of the human mind. For the court to relate the plea of automatism to answering the question whether or not the accused knew the nature and quality of his act is to consider only the one symptom of mental disorder, namely, a defect of the understanding. The outdated assumption that the human mind was divisible into neatly separate compartments—the intellect, the will and the emotion—each operating independently of the other has long since been exploded, nowhere more cogently or comprehensively than in the Report of the Royal Commission on Capital Punishment. However expedient, therefore, the restrictions imposed by the M'Naughten Rules may be in limiting insanity as a defence to defects of the understanding, it provides no justification for introducing the same strait-jacket formula as the governing criterion when dealing with the wider question of automatism affecting sometimes the will, sometimes the understanding in circumstances not amounting to a disease of the mind, and sometimes both together.[49]

Finally, the point should not be overlooked that such a narrow approach to automatism may tend to undermine the wholly admirable course followed by Devlin J. in *R.* v. *Kemp*. Where evidence is available of recurrent attacks of automatism during which the accused resorts to violence, the danger to the community of complete exculpation of the accused from criminal responsibility, and of his being allowed to go free and possibly commit further crimes of violence, inevitably leads to consideration of the imposition of

[48] *R.* v. *True* (1922) 127 L.T. 561; *R.* v. *Kopsch* (1925) 19 Cr.App.R. 50; *R.* v. *Flavell* (1926) 19 Cr.App.R. 141, and *Sodeman* v. *The King* [1936] W.N. 190. For details of the attempts made, from time to time, to extend the M'Naughten Rules to include uncontrollable impulse, see Report (Cmd. 8932), pp. 404–406, and for the position in other Commonwealth countries and in the U.S.A., see *ibid.*, pp. 105, 407–411. An interesting revelation concerning the ambit of automatism was made before the Royal Commission by the Director of Public Prosecutions, who stated that if the existence of automatic epilepsy (*sic*) was established, such as might be responsible for an irresistible impulse, he would not consider calling evidence for the Crown that the accused did not come within the M'Naughten formula (*ibid.*, p. 95).

[49] Appreciation of this same problem is to be found in the Report of the Royal Commission on Capital Punishment. In describing as "dangerous" and "fallible" the divorcing by the M'Naughten Rules of the reason from other mental faculties, it is further stated: ". . . the same argument applies in varying degree, to any attempt to define responsibility in terms of impairment of any particular mental function whose sound operation is conceived to be a necessary element in criminal intent (*mens rea*). . . . Such abstractions may sometimes serve a useful purpose, but they are all too likely to confuse the issue and to mislead those who seek to apply them" (*ibid.*, pp. 113, 114).

some restraint. By raising the issue of insanity in a case of automatism resulting from disease of the mind, notwithstanding the absence of any express plea to that effect by the accused,[50] Devlin J. has shown the way to meeting what had been accepted as a defect in the law. For, in the event of the jury returning a verdict of guilty but insane, the accused can be committed to Broadmoor for surveillance and treatment, to be followed later by an absolute discharge if a cure is effected. This policy, it must be emphasised, can only apply where the formula of " a disease of the mind resulting in a defect of reason " is satisfied. Disease of the mind resulting in disorders of the will, and manifested in a state of automatism, are outside the purview of the M'Naughten test.[51] In drawing renewed attention to this inherent defect in the M'Naughten Rules the judgment of Devlin J. in *Hill* v. *Baxter* has provided an additional argument in favour of revising the present law of criminal insanity.

J. Ll. J. Edwards.*

[50] Although no express statement to this effect is to be found in the reports of the learned judge's ruling, the interpretation to be placed on Devlin J.'s decision, it is suggested, is clearly to permit the trial judge or the Crown to raise the *issue* of insanity once *evidence* is led as to the accused's suffering from a *disease of the mind*. This ruling goes beyond the reform recommended by the Royal Commission on Capital Punishment—see Report, pp. 153–156. It does not follow that a plea of automatism automatically raises the issue of insanity—see Hall-Williams, (1957) 20 M.L.R. 55, at p. 57, and *cf.* Griew, [1957] Crim.L.R. at pp. 525–526, and Prevezer, [1958] Crim.L.R. 144. It is interesting, too, to note the opinion expressed by the Attorney-General during the Committee stage of the Homicide Bill (560 H.C. Deb., c. 1252) that the trial judge would be entitled to leave the issue of insanity with the jury once evidence is introduced by the defence with a view to establishing diminished responsibility—see Armitage, [1957] Camb.L.J. at pp. 189–190.

[51] In cases of murder, but no others, there is, of course, the possibility of invoking the newly established doctrine of diminished responsibility under the Homicide Act, 1957, s. 2, a suggestion made in the course of his judgment by Lord Goddard: [1958] 1 Q.B. at p. 283. As yet the courts have exhibited a studied reticence as to the meaning and effect of the statutory provision, tending to lean heavily on the Scottish decisions for guidance. See *R.* v. *Dunbar* [1957] 3 W.L.R. 330, at p. 333, and *R.* v. *Spriggs* [1958] 1 Q.B. 270 at pp. 274–275, citing at length Lord Cooper's (Lord Justice-Clerk) charge to the jury in *H.M. Advocate* v. *Braithwaite*, 1945 S.C.(J.) 55.

* Reader in Law in the Queen's University of Belfast.

COMPENSATION IN FRENCH CRIMINAL PROCEDURE

When a person suffers injury or loss through the criminal act of another, the common law has as its first procedural premiss that there must be no participation in the criminal trial by the injured party except as a witness. The reason appears to be historical. There is nothing absurd in adopting the opposite rule that the injured party may participate as a principal in the criminal trial to urge a civil claim. In France this alternative has been adopted, also for historical rather than consciously chosen reasons, and a body of procedural law has resulted which it is instructive to examine. The purpose of this article is to consider the merits and demerits of allowing the injured party to join in the criminal proceedings as a claimant, in the light of the French experience.

Only the *partie civile* system as it operates in France will be outlined here. Particular note will be taken of difficulties encountered in practice and occasional reference will be made to the position in other countries. Anything more ambitious would be beyond the competence and scope of this article. Moreover, an examination in detail of the *partie civile* procedure would be out of place because basic differences are all that can be relied upon for instructive comparison in this context. Details are hardly comparable between two such different systems of procedure as those of France and England. Similarly, there would be no point in taking up space with a general description of French criminal procedure. It has been sufficiently often treated in English for it to be reasonably assumed that the structure is known and, in particular, the function of the *juge d'instruction* understood.[1]

The Action Civile

A distinction is drawn in French criminal procedure between the *action publique*, or prosecution, and the *action civile*. The latter has been defined as *celle qui a pour objet la réparation du préjudice individuel causé par une infraction à la loi pénale*.[2] It may be brought by virtue of the *Code d'Instruction Criminel*, article 2.

This definition reveals at once the distinction from any action known to the common law. It is a special action to deal with

1 For English articles see Glanville Williams *The Proof of Guilt*, p. 23, n. (3). See also Szladits *A Bibliography on Foreign and Comparative Law Books and Articles in English*, Part 8. Hereinafter the abbreviations CC, CP, and CIC will be used to denote the Code Civil, the Code Pénal, and the Code d'Instruction Criminel, respectively. Vabres will stand for H. Donnedieu de Vabres, *Traité de Droit Criminel et de Législation Pénale Comparée*, 3rd ed.; and V. & M for Vidal et Magnol, *Cours de Droit Criminel*, 9th ed.

2 Vabres, art. 1117, p. 629.

the particular case of injury caused by a criminal act. In the common law no legal significance is attached to the fact that behaviour giving rise to a civil action may also constitute a crime.[3] Here we have a form of action for such a case.

It should be noticed that the effect of article 2 is to confer only a form of action, not a cause of action. For the plaintiff to succeed he must bring his case within the *Code Civil*, article 1382. In other words he must at least prove negligence.[4] Given a cause of action under the civil law, article 2 confers a procedure applicable where the cause arises from a criminal act.

Since this is in principle an ordinary action for damages, the plaintiff (the *partie civile*) may compromise it [5] or assign his rights to a third party [6] as in any other action. As one might expect, the general law applies, unaffected by the fact that the cause of action is grounded in a criminal offence. The rules governing capacity or the doctrine of subrogation, for example, remain unaltered.[7]

(1) *Object of the Action*

The guiding principle of the *action civile* is that it exists as far as possible to enable the injured party to be put back into the position he occupied before the offence took place. Its main object is therefore the award of damages. These should cover not only the loss actually sustained, *lucrum cessans*, but also potential loss or loss of profit consequential upon the injury, *damnum emergens*.

Since the object is, however, to put the victim back where he was, or rather where he would have been, it follows that no matter how the damages are calculated they must in no case exceed the loss they are designed to repair. In this connection it is interesting that damages may not be ordered to be paid to some fund or institution instead of to the party injured, even with the latter's consent.[8] Formerly the court had power to do this, but it was felt that the temptation to forget the principle of repairing a specific loss and to award damages more generously where the institution was, for example, charitable, was too great.

The power was therefore abolished. One wonders how much change occurred in the practice of the courts. It is still perfectly possible for a claimant to indicate to the court that he proposes to give any damages recovered to charity, particularly under the elastic French rules as to relevancy.[9] Perhaps the courts are now

[3] Except for the tort/felony rule.
[4] V. & M. pp. 855–856. On the CC art. 1382 see Lawson, *Negligence in the Civil Law*, pp. 47 and 186.
[5] CC art. 2045.
[6] In accordance with CC, art. 1690.
[7] Vabres, arts. 1120–1121, pp. 631–632, gives these examples.
[8] CP, art. 51.
[9] As to which see Glanville Williams, *op. cit.*, pp. 71–72.

restrained by the reflection that a pious plaintiff can always change his mind.

(2) *Relief available*

The principle of repairing the loss actually caused is by no means so indissolubly connected with money as in Anglo-Saxon minds. Where some more appropriate course of action suggests itself than the award of damages the court may make an indefinite variety of orders. Examples [10] would be the restitution of stolen property, the closing of premises where a trade has been carried on illegally, or the correction of falsified documents. Advertisement of the court's findings in suitable newspapers at the expense of the defendant may also be resorted to and is not uncommon.[11]

This power to order what may be termed compensation in kind is in the unfettered discretion of the court and does not depend, as does the award of damages, on application by the plaintiff first. It may be that the actual powers of the court, with the exception of the advertisement procedure, are not significantly wider than those known to the common law. The true difference, here as elsewhere, seems to lie in the attitude to those powers. In France a request for recompense from the offender other than in damages lacks the exceptional character it still bears in English law, notwithstanding a long exposure of our judges to the views of the Mikado on fitting the punishment to the crime.

Apart from damages and compensation in kind, the *action civile* also exists to permit the recovery of the costs of prosecution incurred by the state or, as will be seen in due course, by the *partie civile* himself. The award of costs is also distinguished from damages in that no application by the claimant is necessary to give the court jurisdiction. As to this, the English courts also have a general power to award costs in criminal cases.[12]

(3) *Parties*

There are two main distinctions between the *action civile* and the *action publique* or prosecution, using that word in approximately the English sense in which it refers to the actual proceedings in the criminal court. The first of these concerns the persons by and against whom the actions may be brought. An *action publique* is set in motion by the public prosecutor's department (the *ministère public*) against the accused and against him alone. An *action civile* can be brought only by the party injured and in this the accused may be only the principal, and not the sole, defendant.

In other words, the *action civile* may not be instituted by the state. At first sight this seems natural, but there are several objections to it. In the first place, it is open to the same objection

[10] Vabres, art. 1118, p. 630.
[11] V. & M., art. 606 *bis*, p. 863.
[12] Costs in Criminal Cases Act, 1952.

as the English system in too rigidly separating the so-called civil and criminal consequences of an offence. It may be said that this is undesirable and unnecessary where it can be avoided. Ultimately the damage to the particular victim is as much the concern of the state as any notional damage to society at large caused by the criminal offence as such. This is proved, if by nothing else, by the fact that courts of civil jurisdiction exist and are maintained by the state for the purpose of remedying private grievances.

Secondly, it is not necessarily just or reasonable to saddle the *partie civile* with the costs of recovering for his personal damage when the interests of the rest of society, which has suffered no actual injury, are looked after by the state. The fact that these costs may be reclaimed in the action is hardly relevant when inability to put them up may result in the action not being brought at all.[13] This objection has particular force in France, where in order to start an *action civile* the plaintiff must first pay into court the sum estimated to be necessary to cover all fees of the proceedings, including registration of the judgment![14] This rule may evidently cause hardship where the injured party is not well off. It has been described as "frequently an obstacle to his claim."[14]

Thirdly, it may prevent any one tribunal familiar with the whole case from being able to view the criminal sentence and the civil compensation as a whole from the point of view of the offender. This is one of the most obvious defects of the English system.

Fourthly, it creates another situation where hesitation or ignorance of the law can deprive an injured party of his remedy, or at least of the most convenient remedy. As things are, if through hesitation or ignorance he fails to institute his action in time or at all the *partie civile* loses his chance. If the state were empowered to intervene on his behalf, either at his request or in its discretion, the probability of such an occurrence, although still existing, would be much reduced. It may be of course that in France prospective plaintiffs are sufficiently eager to take legal advice for the situation rarely to occur.

It is interesting that in other countries representation of the *partie civile* is included among the duties of the public prosecutor in appropriate cases. In Austria, for example, article 46 (4) of the Code of Criminal Procedure provides simply that at the request of the *partie civile* his representation may be undertaken by this functionary. In Sweden the *partie civile* may proceed on his own account or request the public prosecutor to include the claim in his own case. If the latter course is adopted the prosecutor has a discretion whether to undertake the duty. He may refuse wholly or in part on the ground that the claim appears to him to be unjustified. His refusal, however, must in turn be justified. In any case the public prosecutor is under a duty to notify all persons

[13] *Cf.* our legal aid system.
[14] V. & M., art. 607 *bis*, p. 863.

affected by the prosecution of their right to intervene as *parties civiles.*[15]

In Spain it seems that a request for representation by the injured party is not necessary. Provided that he has not entered a formal renunciation of his rights in the action the public prosecutor may include a claim on his behalf in the case.[16] In Colombia there appears to be a general power for the prosecutor to demand damages for victims where no *action civile* has been started.[17] The Italian Code of 1930 made special provision for representation by the public prosecutor for persons suffering incapacity through nonage or on mental grounds.[18] No doubt many other examples could be found.

(4) *Choice of court*

The second main distinction between the *action publique* and the *action civile* rests on jurisdiction. The former can only be brought before a criminal tribunal, but the latter may be brought in either the criminal or the civil courts. The *partie civile* may take his choice.[19] As will be seen, there are weighty advantages in bringing the claim before the criminal court.

The main procedural consideration to be borne in mind is the rule that where concurrent criminal and civil proceedings are being taken in respect of the same offence the civil action will be suspended until judgment is delivered in the criminal court.[20] This rule is concisely expressed by the aphorism *Le criminel tient le civil en état.* Taken together with the complications and delays of French civil procedure, as compared with the treatment accorded an *action civile* in the criminal courts, and certain very practical advantages of a different kind which will emerge in due course,[21] it renders resort to the civil jurisdiction in a case of this kind both unlikely and, so far as can be seen, pointless.

If an action is started in the criminal court the main point to be borne in mind is that the criminal jurisdiction is strictly confined to the subject-matter of the cause. Any ancillary or consequential civil relief beyond the immediate repair of the damage will not be entertained. Also, once the choice between the courts has been made it cannot be changed. The maxim *Electa una via, non datur recursus ad alteram* applies in the interest of the accused. It is not clear why there should be a rule to this effect. Having to pay

15 Burtin, *Les Tribunaux et la Procédure en Justice du Royaume de Suède*, pp. 276–277.

16 Spanish Code of Criminal Procedure, art. 105. (Reference from Vabres, p. 631, n. (1), where he also quotes the Norwegian Code, art. 440, as another example of representation by request.)

17 Criminal Code of 1936. (Reference from Vabres, *op. cit.*, n. (2).)

18 Reference from Vabres, *op. cit.*, n. (2).

19 CIC, art. 3. There are some minor exceptions to this, where the action must form part of a criminal proceeding. (See Vabres, p. 643.)

20 CIC, art. 3.

21 Below, pp. 393 *et seq.*

the wasted costs of both sides would normally be a sufficient discouragement to vacillation. It is therefore not without interest that the French courts have sought to circumscribe its operation.

Initiation of Proceedings

The discussion has proceeded so far on the assumption that a prosecution was already in existence or contemplated in which the victim could participate or not at his option. Logically anterior to this is the question what happens if the responsible authority refuses to prosecute or refrains from prosecuting.

There are two possibilities: either the victim can be left with only the remedy in the civil courts, or he can be given power to initiate a prosecution on his own account. The decision involves an important question of public policy. For all practical purposes the former alternative is the one adopted in England.[22] In France the latter has been chosen and its proper regulation has given rise to the most serious and disputed problems occasioned by the system of the *partie civile*.

(1) *Two decisions*

The party injured can remedy the inaction of the *ministère public* by initiating a prosecution himself. His powers in this respect are limited to starting the proceedings. Thereafter the conduct of the case remains in the hands of the usual authorities. To exercise his power the person aggrieved delivers to a *juge d'instruction* a *plainte accompagnée de constitution de partie civile*.[23]

Formerly there was much doubt as to the effect of this. It was clear that a plaint alone did not put the *ministère public* under an obligation to prosecute, or the *juge d'instruction* under an obligation to open an inquiry. The question was whether the addition of the declaration that the private individual intended to take part in the proceedings as *partie civile* altered this situation by obliging the *juge d'instruction* to open an inquiry notwithstanding contrary instructions from the *ministère public*.

A famous decision of the *Chambre criminelle* of the *Cour de Cassation* in 1906 [24] settled that a plaint lodged by someone constituting himself *partie civile* in the proceedings effectively seised the *juge d'instruction* of the cause, so that he was bound to open an inquiry whatever the instructions of the *ministère public* might be,

[22] The word " practical " is stressed. A private individual can of course prosecute if the police or the D.P.P. will not, but the limitations in practice on prosecuting against the decision of these bodies are so considerable as compared with the ease of taking a similar course in France that the statement in the text is thought to be justified. See Jackson, *The Machinery of Justice in England*, 2nd ed.

[23] CIC, art. 63. This is in the case of *crimes*. For *délits* and *contraventions de simple police* there is a simpler procedure by *citation directe*.

[24] December 8, 1906; D.P. 1907.1.207; S. 1907.1.377.

or even if there were none. A further problem then arose, the importance of which will be fully appreciated when the abuses of the procedure are examined in the next section.

This problem was whether the *juge d'instruction* was bound to direct his investigations against the individual accused in the plaint, or whether he could exercise discretion as to the persons against whom he proceeded. The question was answered in 1925 in favour of the *partie civile*. The *Chambre criminelle* held that the *juge d'instruction* was not master of the proceedings. He was seised *in personam* in respect of the person accused and not *in rem* in respect of the charge as a whole. He was therefore without discretion as to whom he inquired against.[25]

(2) *Abuse of the procedure*

The combined effect of these two decisions was to put anyone who thought himself the victim of a criminal offence, and some who knew they were not, in a very strong position. It turned out to be too strong. The following passage was written by a learned author in 1931.[26]

"Privileges of this order could not but give rise to abuse. In practice, a simple declaration in support of a plaint, without any precise evidence, is sufficient to compel the judge to inquire against the person named. Plaints are sometimes the work of unbalanced or illiterate individuals whose imaginations have rapidly transformed a slight indelicacy into a legal wrong. More often they are lodged by defaulting debtors attempting to gain time by turning to their own advantage a benevolent interpretation of the maxim *le criminel tient le civil en état*; or litigants who want to turn the facilities of a criminal inquiry to their own advantage by using it to obtain more evidence for a civil action; or even more simply, blackmailers who will later reap a reward for discontinuing the proceedings."

It is evident that much turns here on the damaging, and perhaps protracted, publicity that can accompany the *instruction*. The learned author goes on to point out that as matters stood the unscrupulous user of the *partie civile* procedure ran relatively little risk of reprisal in the courts. Apart from the probability of his not being worth suing, the expense and delay of civil procedure would discourage an action for damages. If such an action failed the victim would be worse off than before in the matter of reputation, particularly if it had afforded a blackmailer another opportunity publicly to air his insinuations.

As to the criminal law, the offence of defamatory accusation[27] required a very difficult proof of bad faith on the part of the accused (the original prosecutor). For this reason it was rarely

[25] May 28, 1925; DP. 1926.1.121; S. 1926.1.140.
[26] Marcel Fréjaville in DH. 1931 (Chronique) 61.
[27] CP., art. 373: *dénonciation calomnieuse*.

enforced by the public prosecutor and hardly encouraging to a private one, who stood to lose more by an acquittal than to gain by a conviction.[28]

Some interesting figures are quoted by Fréjaville [29] to show the extent of the abuse of procedure. In 1910 in the jurisdiction of the tribunal of the Seine there were 600 *constitutions de partie civile*. By 1930 the number had risen to 3,000, of which three-quarters ended in dismissal of the complaint. The inevitable result was overburdened judges and a general deterioration in the speed and standard of the work of the courts.

(3) *Reforms*

Considerable criticism of the existing state of affairs led to a reversal of the previous attitude of the *Cour de Cassation* [30] and to a major intervention by the legislature. The law of July 2, 1931,[31] was passed in an attempt to remedy some of the foregoing abuses. It may be divided into three parts.

The first part nullified the decision of 1925 by enacting that where a plaint was filed which in the opinion of the *ministère public* disclosed insufficient grounds for prosecuting the person accused therein, he could require the *juge d'instruction* to open a provisional general inquiry into the affair. In this case the judge was empowered to question the person or persons named in the plaint as witnesses instead of as accused.[32]

The purpose of this reform was to avoid the infliction of the moral damage which usually followed merely from being publicly accused of certain crimes. No accusation would now be made unless the *juge d'instruction* were satisfied that there were adequate grounds for it. An incidental result was to avoid the rule *le criminel tient le civil en état* where the plaint was merely the work of a bad debtor seeking to gain time. This rule applies only where one of the parties to the *civile* proceeding is expressly named as an accused.

The new situation is not entirely satisfactory. Witnesses are obliged to take the oath. If a person who may be accused is called as a witness he may find himself having to give false evidence to avoid prejudicing his own case. There is also the possibility that a general inquiry may be used as a convenient pigeon-hole for cases which the judge, through overwork or for other reasons, does not feel inclined to pursue. This depends on the standards of duty adhered to.

The next change made was improvement of the existing civil

[28] There appears to be an intriguing possibility of an endless feud here. Each acquittal of defamatory accusation would seem to provide fresh ground for alleging defamatory accusation, the parties eternally exchanging roles.
[29] *Op. cit.* and accepted by Vabres, art. 1324, pp. 760–761.
[30] January 29, 1931; DP. 1931.1.89.
[31] Incorporated in part in paras. 2, 3, 4 and 5 of the present art. 70 of the CIC.
[32] In accordance with CIC, art. 71.

sanctions. In particular, where the charge was dismissed, the accused was now empowered to bring an action for damages for the wrongful prosecution for which a special procedure more efficient than for ordinary civil actions was created. If the plaintiff succeeded the court could order publication of the judgment at the defendant's expense.

The right of action for damages seems only to have been declaratory of the common law,[33] but the accompanying reforms of the procedure were new and an improvement. It is to be noticed that the *Chambre criminelle* has since decided that since this action is based[34] on article 1382 of the *Code Civil*, proof of fault is necessary.[35] Now the law of 1931 has placed upon the *ministère public* and the *juge d'instruction* the responsibility for inculpating the person accused in the plaint. The result is to make proof of fault in this context very difficult indeed.

The third part of the statute created a new criminal offence, which consisted of publishing any information relating to a *partie civile* plaint before delivery of judgment. The object of this was to restrict the publicity obtained by a prosecutor in bad faith. One may agree with Fréjaville[36] in finding it surprising that wider use of criminal sanctions was not made to remedy abuse on the scale which had grown up.

It seems that part of the reason may lie in a certain sensitivity to criticism on the part of the *ministère public* which makes it unwilling to enforce sanctions likely to attract unfavourable comment. The learned author compares the situation at that time[37] with that in Belgium, where official prosecution for defamatory accusations was customary. Perhaps as a result of this policy, abuse of the procedure was much less common than in France.

Another development of which mention may briefly be made concerns the extent to which the *partie civile* may intervene in the instruction. Formerly his rights in this respect were very limited, but after the decision of 1906[38] it was thought desirable to extend them. The law of March 22, 1921, gave the *partie civile* the same rights of presence at, and intervention in, the proceedings as the accused. It became necessary to serve him with notice of any proceedings or relevant matters. He could be represented by counsel. In setting up a new system of preventive detention the laws of February 7, 1933, and March 25, 1935, also accorded special privileges to the *partie civile* in relation to the imprisonment of the accused.

[33] *i.e.*, of CC, art. 1382. See above, n. 5.
[34] *fondée.*
[35] DP. 1933.1.97; S. 1933.1.169.
[36] *Op. cit.*
[37] 1931. Vabres in 1947 did not qualify these earlier criticisms.
[38] Above, p. 392.

Criticism: Initiation of Proceedings

From all this there emerges no convincing justification of the power to initiate a prosecution merely as a device to obtain the advantages of the *action civile*. It is submitted that in this respect French criminal procedure has allowed the tail to wag the dog. It is one thing to allow the victim of a criminal offence to join his civil claim to a prosecution which is being brought by the proper authorities. To allow him to create a prosecution to which he can join his claim is a very different matter.

The existence of a widespread desire to do this suggests, as may have become clear in the course of the discussion, that there are substantial procedural advantages to be gained by it. Perhaps this has been one of the principal factors in producing not only the abuses but also the reaction to them. It may have been thought simpler to restrain the tail than to strengthen the dog by reforming civil procedure. When one reflects upon the opposition to substantial reforms of procedure in England, this explanation seems quite likely.

Whatever the ultimate reasons for the state of affairs may be, it is submitted that to subordinate the accepted policy for prosecutions [39] to private procedural advantage is undesirable. Even if, as in France, the worst abuses are curbed, ample opportunity is almost certain to remain for the annoyance of innocent people and the encumbering of criminal administration with baseless charges. To give the *juge d'instruction* power to investigate a matter generally may prevent scandal being visited upon persons falsely accused. It does not prevent the waste of judicial time or the harassing of the unfortunate people implicated.

It may be answered that this can occur where prosecutions are at the discretion of the state alone by the giving of false information. This is true but does not rebut the argument. It is no doubt unavoidable that a certain number of false accusations will be made under any system. Surely it is better that they should go no further than preliminary police investigation rather than be multiplied in their consequences through the agency of a public prosecution. The present French law seems to put a premium on false accusations. It is no answer to say that the premium might be larger.

The writer understands that in Norway and Sweden, where a comparable *partie civile* system is to be found, the abuses encountered in France are unknown. The reason for this appears to be that no procedural advantage is to be gained by resorting to the criminal courts instead of the civil ones. It is convenient to join as *partie civile* if a prosecution is instituted, but if there is no prosecution nothing is lost by pursuing the claim in the civil courts in the normal way.

[39] As to which, see p. 397, below.

Criticism: Choice of Court

The policy of allowing the injured party to intervene in the criminal proceedings has not passed unchallenged in France. Two main criticisms have been advanced. It has been said that to ask the criminal court to consider both civil and criminal liability at the same time, to answer distinct questions resting on different legal bases, renders its task unnecessarily complicated. Secondly, it has been thought undesirable to have someone as prejudiced and interested as the *partie civile* a principal at the trial of the accused.

These objections have force. It is interesting that so eminent an authority as Vabres did not answer them directly, preferring to argue that the balance of public interest outweighed them.[40] He first points out that the institution of the *partie civile* is historically a survival from the days when the initiation of a prosecution always depended on the party injured. This fact could evidently be used to represent the system nowadays either as a worthy institution based on irreproachable precedent or as a ghost clanking its medieval chains through which one should pass undeterred.

Without declaring himself in favour of either view Vabres goes on to suggest that at the present day the right to initiate a prosecution, which, as has been seen, derives from the existence of the choice of courts, is a valuable antidote to inertia on the part of those responsible for public prosecution. This suggestion advocates a certain measure of immediate personal interest in setting the machinery of the criminal law in motion. The object is to supplement the inadequacy of the civil service. It is open to a number of objections

In the first place it is inconsistent with the principle of *l'opportunité des poursuites*. Elsewhere[41] Vabres contrasts the practice in Germany with that in France. In the former country the principle of legality is said to obtain, which in this context means that if the responsible authorities are of opinion that an offence against the criminal law has been committed they are bound to prosecute. In France a different rule has been adopted, which may be translated as the principle of the advisability of prosecuting. This gives the *ministère public* a discretion to prosecute after taking all the circumstances into account. For example, if the scandal of a prosecution would be disproportionate to the gravity of the offence committed, action might properly not be taken.

Presumably the point of this discretion is to enable the proper authority to decide in appropriate cases where the balance of public interest lies. It recognises that criminal prosecution is not necessarily an absolute value for society, even though it is in accordance with the logic of the law to prosecute all crimes. If the exercise

[40] *Op. cit.*, para. 1128, p. 641.
[41] *Op. cit.*, para. 1091, pp. 613–614.

of this discretion on behalf of society at large can be nullified by the independent action of a single member of that society to satisfy a personal interest, what has become of the basic principle?

Secondly, there is an uncomfortable suggestion of bribery about encouraging people to prosecute by offering them a convenient civil remedy. Such a policy can give rise to abuse where the differences between being an accused and being a defendant are great. This theoretical fear has been fully borne out by the French experience in practice. As appeared in the previous section, any inertia on the part of the *ministère public* may well have been a blessing at some stages.

This leads to the third objection. Private prosecution on any scale might just as well result in an increase as in a decrease of inertia on the part of the authorities. It might well induce the attitude that to investigate crimes about which no one is aggrieved is a waste of time and energy when there are so many which people are only too anxious to prosecute. The *ministère public* may or may not be attentive to its duties, but surely the answer here is governmental or parliamentary supervision to see that the department does its job properly, not a denial of the principle upon which it is supposed to work.

Vabres's next point is that it is desirable that the victim of a serious offence should not be compelled to take his case before the civil courts through a "costly procedure bristling with formalities."[42] Quite so, but why should anyone else? To allow the victim to intervene in the criminal proceedings may well be a good thing but the shortcomings of civil procedure do nothing to prove this. The highest at which the argument can be put is as a temporary recommendation on the ground of expediency.

Having presented arguments from history, the public interest, and the interest of the victim, Vabres comes to justice. It is in the interest of justice that the civil issue should be tried by a criminal court, because the act complained of is a crime. This argument is difficult to follow. If it is correct, why permit an *action civile* to be brought in the civil courts at the option of the party injured? Why is a bench of criminal lawyers more competent than their civil brethren to estimate the consequences in civil law of any given act?[43]

Lastly, the argument is advanced that the possibility of contradictory decisions in the criminal and civil courts is avoided if the two issues can be decided by the same court. This also seems to founder on the rock of the option to sue in the civil courts.

Having rejected all of Vabres's arguments in support of the right of the *partie civile* to intervene in the criminal proceeding, what

[42] A criticism which he makes more than once when referring to civil procedure.
[43] The air of unreality is increased by the reflection that in all probability a judge in the course of his career will have to try both criminal and civil issues, regardless of his particular professional leanings.

answer can be given to the two criticisms which they were designed to rebut? The first one, that to ask the criminal court to answer different legal questions is to complicate its task, is susceptible of simple denial. Many cases, both civil and criminal, arise every term in which judges are called upon to decide a variety of issues, sometimes very complex, which stem from one cause of action. They usually show themselves competent to deal with these intellectual demands in England, and there is no reason to believe the situation to be different in France. It is submitted that there is nothing exceptionally complex in combining a criminal trial with a civil claim so far as the law is concerned.

As to the undesirability of allowing the prejudiced and interested party injured to take part in the trial, the force of this clearly depends on the extent to which he is in fact going to participate. In England we have the tradition of complete impartiality on the part of the prosecution, counsel for whom would never be permitted to go as far as counsel for the plaintiff in a civil action. If counsel for the party injured were to be allowed to present precisely the case which the prosecution were not, our present ideas on how to conduct a trial would have to be sharply modified. This point is made more significant by the continued widespread use of the jury in England. However, if the civil claim were to be heard after the verdict in the trial, on the basis of the findings, this objection would lose its force.

Proposals for Reform

In France various legislative proposals have been made with a view to improving the *action civile* from the point of view of the plaintiff. This may seem surprising after the abuses of the procedure which have been discussed. The explanation is that whilst the action served the purposes of an unscrupulous prosecutor only too well because of its incidental advantages, it was defective in a number of ways when a genuine claimant sought to put it to its proper use and recover damages.

Some of these faults have already appeared. The deposit of costs in advance, for example, and the inability of the *ministère public* to represent the *partie civile*, work to the detriment of the party injured without benefiting the accused. Many suggestions have been made, particularly to try to improve the *partie civile's* chances of recovering damages in fact as well as in law. Not the least of the drawbacks of the system appears to be the difficulty of enforcing a judgment.

To remedy this it has been proposed in default of payment to place upon the offender an obligation to work for the profit of the creditor, either at liberty or in prison, until the debt is discharged. This was to be reinforced by rendering the debtor's sources of income liable to attachment, or giving the creditor the benefit of special charges or hypothecations over the debtor's possessions.

Punishment might be suspended on condition that reparation was paid.

An interesting sidelight on the psychology of *parties civiles* is provided by the suggestion that a fund might be created out of damages recovered but not claimed. This could be supplemented by fines imposed in the normal course of criminal administration, and the fund then applied to alleviating the distress of plaintiffs who could not effectively enforce judgments in their own favour. A more prosaic recommendation has been made that the preliminary deposit of fees should be abolished. The heretical suggestion has even been heard that the *action civile* itself could be abolished in favour of a power for the *ministère public* to claim on behalf of injured parties. Such a step would, no doubt, be regarded as a trespass upon the individuality of the Frenchman as awful as abolition of the jury would be upon the communal wisdom of the Englishman. A radical proposal has been made by the Italian positivist Ferri. He has advanced the attractive argument that in principle compensation for the damage caused by a criminal offence is a duty of the State. The State should prevent wrong-doing. When it fails in this duty, as it does whenever a crime is committed, it should repair the damage caused by its fault and be subrogated to any rights of the injured party against the offender.

These divers suggestions were considered by international penological congresses at Paris and Brussels. They were for the most part rejected as being in conflict with sound penological principles. The recommendations were made that the requirement of the preliminary deposit of fees be dispensed with and the successful *partie civile* relieved altogether of the obligation to pay them; that the public prosecutor be empowered to present a claim on behalf of the victim; and that an award of damages be secured by a charge on the property of the accused. These recommendations are simple and cautious enough. It is curious that penologists should not, apparently, have desired the restriction or abolition of the power to initiate a prosecution privately as a means to pursuing an *action civile*.[44]

C. Howard.*

[44] On this section generally, see V. & M., para. 608, pp. 865–867.

* LL.M. (London).

NOTES OF CASES

The Contractual Effect of Articles of Association

The exact effect of what is now section 20 (1) of the Companies Act, 1948,[1] has long been one of the most baffling questions in company law. It is fairly clearly established that the memorandum and articles of association constitute a contract between the company and the members in so far as they confer rights or duties on the members *qua* members,[2] but not in so far as they confer rights or obligations on members in some other capacity, for example *qua* directors.[3] Whether they also constitute a contract between members *inter se* has hitherto been completely uncertain, but if so, once again, it can only be as between members as such.[4] The present writer has elsewhere argued for the view that section 20 does establish a contract between members *inter se*, so that a direct action between members should be permitted when the articles confer a right of pre-emption or first refusal when a member wishes to sell his shares.[5] Accordingly he cordially welcomes the decision to this effect of Vaisey J. in *Rayfield* v. *Hands*.[6]

On the other hand the arguments of the learned judge in a reserved judgment cannot be regarded as wholly convincing and the decision is likely to create as many doubts as it resolves.

The relevant article of the private company concerned reads as follows:

> "Every member who intends to transfer shares shall inform the directors who will[7] take the said shares equally between them at a fair value . . ."

A member informed the directors of his intention to transfer his shares to them in accordance with this article. The directors denied their liability to take the shares and the member accordingly commenced proceedings against them.

Vaisey J. conceded that the cases established that the articles could, under section 20, only be regarded as a contract between the members *inter se* if it related to them in their capacity as members.

1 "Subject to the provisions of this Act, the memorandum and articles shall, when registered, bind the company and the members thereof to the same extent as if they respectively had been signed and sealed by each member, and contained covenants on the part of each member to observe all the provisions of the memorandum and of the articles."

2 *Hickman* v. *Kent & Romney Marsh Sheepbreeders Association* [1915] 1 Ch. 881.

3 *Beattie* v. *Beattie* [1938] Ch. 708, C.A.; *cf. Eley* v. *Positive Govt. Security Life Assce.* (1876) 1 Ex.D. 88, C.A.

4 *London Sack & Bag Co.* v. *Dixon & Lugton* [1943] 2 All E.R. 763, C.A.

5 *Modern Company Law* (2nd ed.), pp. 253–254.

6 [1958] 2 W.L.R. 851, also reported in [1958] 2 All E.R. 194.

7 Vaisey J. applying the maxim *ut res magis valeat quam pereat* construed "will" as equivalent to the mandatory "shall": p. 853.

On the face of it the obligation to purchase was imposed not on members *qua* members, but on directors *qua* directors. But he brushed aside this objection saying "in my judgment the relationship here is between the plaintiff as a member and the defendants not as directors but as members."[8] This conclusion was supported only by a dictum of Pearson J.[9] which Vaisey J. appeared to interpret as a statement that directors were merely a sub-species of members. This, of course, is palpably incorrect as a general statement; directors do not even have to be members; doubtless they happened to be in the present case,[10] but in many cases they are not. How, consistently with earlier cases such as *Beattie* v. *Beattie*[11] a decision of the Court of Appeal, this contract, if contract it was, could be regarded as imposing obligations on the directors *qua* members is difficult to comprehend. The only way in which the decision might be reconciled with the actual result in earlier cases is by saying that the test of whether an article constitutes an enforceable contract depends not on the capacity of those on whom it purports to confer rights or duties, but on whether its exercise affects them as members. In the earlier cases the purported application of the article did not affect members as such. Here, on the other hand, although the obligations were conferred on the directors as such, the exercise of it *affected* them as members, since it operated to increase their shareholdings but left their position as directors unchanged. It is difficult to find support for this formulation in any of the earlier cases, but from a common-sense point of view there is something to be said for it. It certainly puts a novel slant on the law as previously understood (admittedly imperfectly). If it be right, it would appear to follow that had the article in *Eley* v. *Positive Govt. Life Assurance*,[12] not only provided that Mr. Eley should be the company's solicitor but also that he should be entitled and obliged to buy the shares of any other member wishing to sell, then, although (as there held) he would have had no right to be appointed solicitor (since this in no way affected his position as member), he would have been obliged and entitled to buy the shares (since this affected him in his capacity of member).[13]

Once this difficulty was side-stepped, the learned judge was on firmer ground in holding that the articles constituted a contract directly enforceable by a member against the directors. But he chose a devious route to arrive at this conclusion. He relied first on the (somewhat dubious[14]) dicta of Denning L.J. (as he then

[8] At p. 855.

[9] In *Re Leicester Club & Racecourse Co.* (1885) 30 Ch.D. 629, at 633. The decision in that case is generally regarded as bad law: see Halsbury, 3rd ed., Vol. 6, p. 292 (u) and authorities there cited.

[10] Under the company's articles each director had to hold one qualifying share.

[11] *Supra*, n. 3.

[12] *Supra*, n. 3.

[13] Would it matter whether Eley was already a member (he was in fact) or would it suffice that the article affected his capacity to become a member? Until there is membership surely there can be no contractual nexus?

[14] See (1956) 19 M.L.R. 374.

was) in *Smith & Snipes Hall Farm, Ltd.* v. *River Douglas Catchment Board* [15] and in *Drive Yourself Hire Co. (London), Ltd.* v. *Strutt* [16] regarding the effect of section 56 [17] of the Law of Property Act, 1925. In his view, even if the only contract was between the company and the directors as members, another member could take the "benefit" of the "covenant" and sue on it under section 56. This novel application of section 56 is certainly ingenious, but, with respect, somewhat strained.

Secondly he suggested that the plaintiff might rely on our old friends *Carlill* v. *Carbolic Smoke Ball* [18] and *Clarke* v. *Dunraven.*[19] He did not elaborate this suggestion but presumably meant that the provision in the articles was a general "offer" by each member to every other member which was "accepted" either by joining the company or by proffering shares for sale. This, however, begs the whole question, which is whether the "offer" is deemed to be made by the company or by the members, or by both.

Finally, he relied on the fact that in *Dean* v. *Prince* [20] the Court of Appeal had been concerned with a similar article and had not taken the point that the directors might not be under a legal obligation to buy. This, with respect, seems to be the frailest straw of all. In *Dean* v. *Prince* neither party had argued that he was not bound by the article and the court's jurisdiction was invoked solely because of a disagreement about the "fair value." It seems far-fetched to suggest that this can be regarded as any authority for the proposition that the article constituted a contract which one member could enforce against another.

Vaisey J. concluded his judgment with the cryptic observation that: "The conclusion to which I have come may not be of so general an application as to extend to the articles of association of every company, for it is, I think, material to remember that this private company is one of that class of companies which bears a close analogy to a partnership. . . ." If all this means is that this type of article is only likely to be found in the case of private companies, no one could quarrel with it. If, however, it means that section 20 differs in its effect as between private and public companies one can only say that the wording of the section lends no support to such a conclusion.

To sum up:

(1) It is believed that Vaisey J. is correct in concluding that articles constitute a contract enforceable as between members *inter se*, but this belief is based on the wording of section 20 construed

[15] [1949] 2 K.B. 500, C.A.
[16] [1954] 1 Q.B. 250, C.A.
[17] "A person may take an immediate or other interest in land or other property, or the benefit of any condition, right of entry, covenant or agreement over or respecting land or other property, although he may not be named as a party to the conveyance or other instrument."
[18] [1893] 1 Q.B. 256, C.A.
[19] [1897] A.C. 58, H.L.
[20] [1954] Ch. 409, C.A.

in the light of its history [21] and on dicta not quoted in the judgment,[22] rather than upon section 56 of the Law of Property Act or the other arguments adduced by the learned judge.

(2) It is not understood how the article in the present case can be construed as conferring obligations on the member-directors *qua* members.

(3) Hence, consistently with earlier authorities, it is not understood how the plaintiff was able to sue the defendant directors.

(4) It would, however, be nice to think that the decision could be supported, for an article in these terms is not uncommon and commercial convenience requires that it should be enforceable. A possible basis for distinguishing the earlier authorities is to say that they all relate to obligations or rights both conferred on members *qua* non-members and affecting their position *qua* non-members and not, as here, affecting their position *qua* members.

(5) The decision is a further example of a tendency to attempt to evade the unnecessarily restrictive rules laid down in the earlier authorities.[23] It seems high time that the matter was reviewed by the House of Lords or section 20 clarified by the legislature.

L. C. B. G.

The Province of the Declaratory Judgment Redetermined?

That the Court of Appeal granted leave to appeal to the House of Lords from its decision in *Pyx Granite Co.* v. *Ministry of Housing and Local Government* [1] is hardly surprising. The issues involved were important and difficult, and on only one of them were the members of the court (Lord Denning, Hodson and Morris L.JJ.) unanimous.

The plaintiffs conduct quarrying operations in the Malvern Hills. In 1924 a Private Act passed primarily in order to preserve the scenic amenities of the Hills had " confirmed and made binding " certain heads of agreement to which the plaintiffs were a party; the heads of agreement were later incorporated in a deed whereby the plaintiffs surrendered certain of their rights in return for a promise by the Malvern Conservators and the Malvern Council to leave them undisturbed in their operations in other prescribed areas. In 1947 the plaintiffs applied for permission to develop land for quarrying purposes; the application was called in for determination by the Minister, who, in 1949, granted permission subject to various restrictive conditions. In 1953 the Minister granted permission for

[21] See Gower, *Modern Company Law* (2nd ed.), pp. 251–252.
[22] *Ibid.*, p. 253.
[23] Note the pregnant dictum of Greene M.R. in *Beattie* v. *Beattie* [1938] Ch. at p. 722 and the remarks of Wedderburn in [1957] C.L.J. at pp. 212–213; and *cf. Woodlands* v. *Logan* [1948] N.Z.L.R. 230, drawing a distinction between rights and duties on the one hand, and powers (*e.g.*, to appoint a director) on the other.
[1] [1958] 2 W.L.R. 371; also reported [1958] 1 All E.R. 625.

the continuance of the operations, subject to further restrictive conditions, and he rejected the plaintiffs' contention that their operations were "development authorised by" a Private Act of Parliament for which no development permission was required under the Town and Country Planning Act, 1947. The plaintiffs accordingly brought an action claiming declarations to the effect (1) that their quarrying operations were "development" for which unconditional planning permission had already been granted by virtue of the 1924 Act; (2) that the Minister's decisions of 1949 and 1953 were therefore invalid; and alternatively (3) that certain conditions imposed by the Minister in his decisions were invalid. Lloyd-Jacob J. granted the declarations sought; the Court of Appeal, by a majority, reversed his decision.

On the main issue, Lord Denning and Hodson L.J. (Morris L.J. dissenting) held that the 1924 Act, although giving statutory confirmation to an agreement subsequently entered into by the plaintiffs with other parties, could not itself be construed as having *authorised* them to do anything; it did not, therefore, exempt them from having to obtain planning permission under the 1947 Act. But Hodson L.J. would have allowed the appeal irrespective of his decision on this point, for he, unlike the other members of the court, was of the opinion that the court had no jurisdiction to award the first two declarations. In his view the combined effect of sections 15 and 17 of the 1947 Act was to invest the local planning authority and the Minister with exclusive jurisdiction to determine whether any operation constituted development of land within the meaning of the Act, so that the jurisdiction of the courts in relation to the matter was ousted except in so far as a right of appeal to a magistrates' court (with a further appeal by way of case stated) might lie in connection with steps taken for the enforcement of planning control.[1a] However, Lord Denning (with whose view Morris L.J. concurred) held that the procedure prescribed by sections 15 and 17 was only an alternative method of obtaining a determination of the question. Section 17 merely empowered an applicant to seek a ruling by the administrative authorities and did not require him to do so.[2] He might prefer to have an authoritative ruling by the High Court instead; and the jurisdiction of the High Court to award a declaration was not to be taken away except by clear words. Recourse to the High

[1a] If the decision of the majority of the Divisional Court in *Eastbourne Corporation* v. *Fortes Ice Cream Parlour (1955), Ltd.* [1958] 2 W.L.R. 886 is correct, the question whether given operations constitute development cannot be raised in an appeal against the validity of an enforcement notice under s. 23 (4), but only as a defence to a prosecution under s. 24 (3) for contravention of the notice; *sed quaere.*

[2] But, as Hodson L.J. pointed out ([1958] 2 W.L.R. at 387), "it would not be sensible to make it compulsory for persons to seek a determination if they did not consider it in their interest to do so," and no special significance could therefore be attributed to the use of the word "may" in s. 17.

Court was not barred by the fact that the Act provided that the Minister's determination was to be "final."[3]

This broad conception of the power of the courts to award declarations in respect of matters for the determination of which a specific statutory procedure has been provided by Parliament—a conception also well illustrated by the recent case of *Francis* v. *Yiewsley & West Drayton U.D.C.*[4]—may point to a significant enlargement of the functions of the superior courts in administrative law. The superior courts now appear to be far more reluctant than they once were to hold that their jurisdiction to determine a question of statutory interpretation by declaration has been impliedly excluded.[5] Moreover, until recently the general rule was that even if recourse to the prescribed statutory procedure for the determination of a question was held to be optional only, the superior courts would not exercise their discretion to determine it by declaration unless special circumstances were present—*e.g.*, where a determination by them was necessary in order to do justice between the parties,[6] or where the matter was one of public importance and affected large numbers of persons.[7] But in the *Pyx Granite* case the only special circumstances seem to have been that if the plaintiffs had been required to follow the prescribed statutory procedure up to the point when it would have been open to them to appeal by case stated they would have had to endure a longer period of uncertainty [7a] and might have incurred some financial loss. And in the *Francis* case the only material advantage that the plaintiff could gain by suing for a declaration was relief from uncertainty.[8] These cases suggest that the presumption against permitting direct recourse to the High Court for a declaration of rights where alternative machinery has been provided is being replaced by a presumption in favour of permitting such recourse.

The assertion of this large declaratory jurisdiction may give rise to a difficulty which is partly obscured by the peculiar facts of the present case, where the plaintiffs were contending not merely that the Minister had erred in law but that his determinations were

[3] *Cf. Taylor* v. *National Assistance Board* [1956] P. 470; [1957] P. 101, at 111.

[4] [1957] 2 Q.B. 136 (McNair J.); [1957] 3 W.L.R. 919; [1957] 3 All E.R. 529 (C.A.). Plaintiff continued use of land as a caravan site after period of planning permission had expired; he was served with an enforcement notice but neither complied with it nor exercised his right to appeal against it to a magistrates' court; held, he could bring an action for a declaration that the notice was invalid although (as the Court of Appeal held) he could have set up the invalidity of the notice as a defence if prosecuted for failure to comply with it.

[5] Contrast *Barraclough* v. *Brown* [1897] A.C. 615, where jurisdiction to award a declaration was held to have been impliedly excluded although jurisdiction over the matter had been conferred upon an inferior tribunal in permissive language only.

[6] As in *Sivyer* v. *Amies* [1940] 3 All E.R. 285.

[7] As in *Dyson* v. *Att.-Gen.* [1911] 1 K.B. 410; *cf. Smeeton* v. *Att.-Gen.* [1920] 1 Ch. 85.

[7a] Though that period might be considerably longer, if the decision in the *Eastbourne* case is correct; see note 1a, *ante*.

[8] For he was actually carrying out the development for which permission had expired, and was awaiting prosecution.

invalid because the relevant question had already been determined by Parliament. But suppose that the 1924 Act had never been passed and that the Minister's determinations had been challenged solely on the ground that they were founded on a misconstruction of the legal meaning of "development." If the court had then proceeded to declare that the plaintiffs' operations did not constitute development, would not this have been tantamount to the usurpation of appellate jurisdiction?[9] And what would have been the status of the Minister's determinations? Since he would have been acting within his jurisdiction they would have been valid, though erroneous, and there would have been two inconsistent sets of determinations standing side by side.[10] This difficulty would not arise if the plaintiffs were to seek a declaration *before* the Minister had made any determination.

Lord Denning (Morris L.J. concurring) also held that the court had jurisdiction to declare the conditions imposed by the Minister to be invalid, although under sections 14 (1) and 15 (3) of the 1947 Act he was empowered to impose such conditions as he thought fit; but that the conditions were fairly and reasonably related to the permitted development and were therefore valid. Hodson L.J. agreed that the conditions were valid, but doubted whether the Minister's decision could have been impeached except by certiorari. In his view it would have been impossible to "mutilate the Minister's decision by removing one or more of the conditions," for "non constat but that no permission would have been given at all if the conditions had not been attached." Lord Denning, on the other hand, was clear that the court could declare that conditions imposed by a licensing authority were invalid,[11] but doubted whether, in the light of recent decisions in which licensing functions had been held not to be of a judicial character, the Minister's decision was reviewable by certiorari.

This conflict of judicial opinion not only re-emphasises the uncertainty that pervades the classification of functions in administrative law but also serves as a reminder that the action for a declaration has yet to achieve unequivocal recognition as an appropriate supervisory remedy in situations where certiorari will lie. It is submitted that the courts ought to regard a decision by the Minister on an application for planning permission, whether at first instance or on appeal from the local planning authority, as reviewable *either* by means of an application for certiorari to quash it *or* by means of an action for a declaration that it is invalid in whole or in part. There is, however, a good deal of force in

[9] Or premature judicial implementation of the recommendation of the Franks Committee (Cmnd. 218 (1957), para. 381) that provision should be made for an appeal to the courts on a point of law from a determination by the Minister under s. 17.

[10] *Cf. Healey* v. *Minister of Health* [1955] 1 Q.B. 221, at 228, *per* Denning L.J.

[11] See *Associated Provincial Picture Houses, Ltd.* v. *Wednesbury Corporation* [1948] 1 K.B. 223.

Hodson L.J.'s objections to the award of a declaration that particular conditions annexed to a grant of permission are invalid, and it will generally be more appropriate to impugn the validity of conditions by applying for certiorari to quash the decision and mandamus to order the competent authority to hear and determine the application according to law.

If an appeal is proceeded with the House of Lords will have the opportunity to consider afresh the scope of the action for a declaration in public law, with special reference to its relationship to alternative administrative and judicial remedies. It remains to be seen how far they will give their approval to Lord Denning's broad dictum [12] that "if a substantial question exists which one person has a real interest to raise, and the other to oppose, then the court has a discretion to resolve it by a declaration, which it will exercise if there is good reason for so doing."

S. A. de Smith.

Invalidity of Dismissal from Public Employment

In *Barber* v. *Manchester Regional Hospital Board & the Minister of Health* [1] the plaintiff, whom the defendants had purported to dismiss, claimed, *inter alia*, a declaration that his employment had never been validly determined. Such a claim, if instituted against a private employer, would undoubtedly have been dismissed. It is a well-established principle that:

> "Normally, and apart from the intervention of statute, there would never be a nullity in terminating an ordinary contract of master and servant. Dismissal might be in breach of contract and so unlawful but could only sound in damages." [2]

Employment under public authorities, however, stands on a different footing from an ordinary master and servant relationship. This was well explained by Barry J. in the present case [3] as well as in an earlier case. In the earlier case he had said [4]:

> "A local authority or any statutory body cannot . . . either employ or dismiss servants except under statutory authority: their powers are derived from the statute or statutes under which they are created, and it is a well-known principle of law that statutory powers can only be exercised for the purposes for which they are granted. Therefore, there may be cases where a local authority in resolving to dismiss a servant or to take any other action can have its decision called into question in the courts if those who challenge it can establish that the decision

[12] [1958] 2 W.L.R. at 383.
[1] [1958] 1 W.L.R. 181; [1958] 1 All E.R. 322.
[2] *Vine* v. *National Dock Labour Board* [1957] A.C. 488, 507, *per* Lord Keith.
[3] At pp. 192–193.
[4] *Price* v. *Sunderland Corporation* [1956] 1 W.L.R. 1253, 1269.

was taken either mala fide or that it was a decision which did not lie within their statutory powers." [5]

In the present case Barry J. found that the Board had not acted in bad faith or on irrelevant considerations. It remained then to be examined whether the Board had overstepped its statutory powers. Before going into this question, it may be worth while to cite the relevant authorities.

One clear instance of a dismissal unauthorised by statute is the case in which a public body, being empowered to terminate employment on specified grounds only, *e.g.*, "educational grounds," dismisses its servant on some other ground.[6] Another instance is the case where a public body does not observe the procedure laid down by legislation, *e.g.*, by improperly delegating the statutory power of dismissal to another body.[7] In those instances, though the court has jurisdiction to declare a dismissal invalid, the question whether or not such a declaration is to be made in a particular case is a matter for the discretion of the court. The cases indicate that the courts in the exercise of their discretion tend to hold a dismissal invalid if based on a ground different from the one specifically prescribed by statute. Much less certain is the position as regards irregularities in the procedure of dismissal. Where the irregularity is trivial and could not possibly have affected the final decision to dismiss, the court will presumably refuse to declare it a nullity. On the other hand, where the irregularity may result in injustice being done to the plaintiff, and an award of damages may not be an adequate remedy, the court will probably be inclined to hold the dismissal invalid.

We may now return to *Barber's* case and examine, first, whether the dismissal was unauthorised by legislation, so as to give the court jurisdiction to declare it invalid. Under a memorandum issued by the Minister of Health, a hospital board was not to carry into effect a dismissal of a consultant before a certain appeal procedure had been completed. In this case, however, the Minister having refused to allow an appeal, the plaintiff was dismissed without the prescribed procedure being followed. Barry J. decided that that procedure was incorporated in the plaintiff's contract of employment and, consequently, awarded damages against the Board for breach of contract. He also made a declaration that the Minister, in failing to comply with the memorandum, acted wrongfully and

[5] The court, it seems, may also declare a dismissal to be invalid if based on irrelevant considerations, even though the decision to dismiss was made in good faith and did not contravene any statutory provision: *Short* v. *Poole Corporation* [1926] Ch. 66, 90–91; *Fennell* v. *East Ham Corporation* [1926] Ch. 641, 651–652.

[6] *Hanson* v. *Radcliffe U. C.* [1922] 2 Ch. 490; *Martin* v. *Eccles Corporation* [1919] 1 Ch. 387; *Sadler* v. *Sheffield Corporation* [1924] 1 Ch. 483; *Short* v. *Poole Corporation* [1926] Ch. 66; *Price* v. *Sunderland Corporation*, *supra*.

[7] *Vine* v. *National Dock Labour Board*, *supra*; *Barnard* v. *National Dock Labour Board* [1953] 2 Q.B. 18.

in breach of his statutory duty. The learned judge declined, however, to declare that the employment with the Board had never been validly determined. He explained[8]: "Here, despite the strong statutory flavour attaching to the plaintiff's contract, I have reached the conclusion that in essence it was an ordinary contract between master and servant and nothing more."

It is respectfully submitted that the relationship between the plaintiff and the Board was not regulated merely by contract. The memorandum issued by the Minister, apart from having contractual effect, was also subordinate legislation, imposing limits on the powers of hospital boards.[9] The learned judge himself, by making the declaration against the Minister, seems to have regarded the memorandum as a legislative instrument.[10] It follows then that the Board acted not only in breach of contract, but also *ultra vires*. The court, in consequence, had jurisdiction to declare the dismissal a nullity.

The question which follows is: was this a proper case for the court to exercise its declaratory discretion? It is suggested that it was. In the first place, the denial of appeal was not a trivial irregularity, but a matter of decisive importance. The learned judge himself, as he pointed out, was reasonably satisfied that if the prescribed appeal procedure had been put into effect the plaintiff would have continued to be a consultant at the hospital. Secondly, employment under a regional hospital board seems to differ from an ordinary master and servant relationship in that it has some characteristics of a statutory monopoly. This was illustrated in the present case: following his dismissal, the plaintiff and his patients were excluded from all hospitals administered by the Board, and he thus incurred losses in his private practice. Dismissal in such a case may mean not only a loss of a particular post, but also a loss of the opportunity to pursue one's profession. Damages, therefore, can hardly be an adequate remedy.[11]

Barber's case indicates a tendency to overlook the special implications of public employment, and too readily to apply to it private law principles. That tendency also underlay the decision of the majority of the Court of Appeal in *Vine* v. *National Dock Labour Board*.[12] But the House of Lords, emphasising the difference

[8] At p. 196.

[9] For the power to make such regulations, see the National Health Service Act, 1946, s. 68 (1). The power of a regional hospital board to determine the conditions of service of its officers was made subject to such regulations: s. 14 (1). For authority to the effect that subordinate legislation may be made in the form of a Minister's circular, see *Blackpool Corporation* v. *Locker* [1948] 1 K.B. 349.

[10] If it is not so regarded, and if the plaintiff is considered a Crown servant—a question which was not examined by the learned judge—then this would be the first case in which, despite strong authorities to the contrary, a servant of the Crown was granted damages for dismissal in breach of contract.

[11] A similar consideration had the greatest weight in *Vine* v. *National Dock Labour Board*, *supra*.

[12] *Supra*.

between the employment in that case and ordinary private employment, held unanimously that damages were not sufficient compensation for the dismissal of the plaintiff, and declared the dismissal invalid.

I. Zamir.

Judicial Review of Emergency Powers

The decision of the Judicial Committee of the Privy Council in *Ross-Clunis* v. *Papadopoullos* [1] deserves a brief note if only because it includes a restatement of the scope of judicial review of wide discretionary powers vested in executive authorities.

The Emergency Powers Order in Council, 1939, which applies to a number of colonial territories including Cyprus, empowers a colonial Governor to declare a state of emergency when prescribed conditions are present and to make "such regulations as appear to him to be necessary or expedient for securing the public safety, the defence of the territory, the maintenance of public order and the suppression of mutiny, rebellion and riot, and for maintaining supplies and services essential to the community." In Cyprus the Governor, having proclaimed a state of emergency, made regulations which (*inter alia*) delegated to local commissioners power to impose collective fines on inhabitants of areas in which offences had been committed, if a commissioner had reason to believe that those inhabitants had failed to take reasonable steps to prevent the commission of such offences or had failed to do all they could to apprehend the offenders. The Governor's approval was required for the making of an order imposing a collective fine. Before such an order could be made, the commissioner had to hold an inquiry into the facts and circumstances giving rise to the order and had to "satisfy himself" that the inhabitants of the area were "given adequate opportunity of understanding the subject-matter of the inquiry and making representations thereon." After a number of terrorist offences had been committed in Limassol the commissioner held a public inquiry with a view to deciding whether to recommend the levying of a fine on the Greek Cypriot inhabitants. Following the inquiry, at which representative Greek Cypriots were invited to show cause why a fine should not be levied, and after further representations from other Greek Cypriot groups had been received, an order imposing a collective fine of £35,000 on the Greek Cypriot inhabitants of Limassol was made.

A group of Greek Cypriot businessmen then applied for certiorari to quash the order. The application was granted in the court of first instance and the decision was affirmed on appeal, but was reversed by the Judicial Committee of the Privy Council. The Judicial Committee held, in the first place, affirming the decision

[1] [1958] 1 W.L.R. 546; also reported [1958] 2 All E.R. 23.

of the courts in Cyprus on this point, and applying dicta in *Att.-Gen. for Canada* v. *Hallet & Carey, Ltd.*,[2] that the regulation authorising the imposition of a collective fine was within the powers conferred by the 1939 Order in Council. The words of the enabling legislation were plain and unambiguous; it was not, therefore, open to a court to restrict their meaning by invoking common-law presumptions of legislative intent, or to canvass the considerations which might have led the Governor to deem the regulations necessary or expedient for effectuating those large purposes. The regulations had, indeed, to be capable of being related to the prescribed purposes, but here they were clearly so related. Secondly, reversing the courts below, it held that the appellant had discharged his obligations in relation to the conduct of the inquiry, inasmuch as additional affidavits submitted by him showed that there were in fact ample grounds on which he was entitled to feel satisfied that the requisite facilities had been afforded to the inhabitants of the area. But in order to establish the invalidity of the order, the respondents would not necessarily have had to establish that the appellant had acted in bad faith. If " it could be shown that there were *no* grounds on which the Commissioner could be so satisfied, a court might infer either that he did not honestly form that view or that in forming it he could not have applied his mind to the relevant facts." [3]

That the existence of facts on which the validity of the exercise of a power is predicated is not conclusively determined by the *ipse dixit* of the competent authority, even where the powers are conferred in " subjective " terms, is supported by numerous other dicta.[4] These dicta serve as a warning against the rigid classification of executive powers as " subjective " and " objective." But the burden of proving total want of evidence is so difficult to discharge that in practice a challenge based on this ground is hardly more likely to succeed than one based on bad faith alone. If, however, the formulation of the test is varied slightly to enable a challenge to succeed on the ground that findings of fact, or inferences drawn therefrom, are such as no reasonable person could have arrived at (and *a fortiori* if it is varied further, to permit a challenge to be founded on the fact that the competent authority could not reasonably have made such findings or drawn such inferences), possibilities of a more effective role for judicial review of executive powers arise. It is worth mentioning that where powers to determine jurisdictional facts have been conferred upon distinct statutory

[2] [1952] A.C. 427, at 445, 450. *Cf.* the decisions on regulations and orders made in virtue of s. 1 (1) of the Emergency Powers (Defence) Act, 1939; see " Statutory Restriction of Judicial Review " (1955) 18 M.L.R. at 589–590.

[3] [1958] 1 W.L.R. at 560.

[4] See, *e.g.*, *Bowman, Re* [1932] 2 K.B. 621, at 634; *Falmouth Clearance Order, Re* [1937] 3 All E.R. 308, at 310–311; *Robinson* v. *Minister of Town and Country Planning* [1947] K.B. 702, at 724; *Thorneloe & Clarkson, Ltd.* v. *Board of Trade* [1950] 2 All E.R. 245, at 247.

tribunals in a subjective form, the courts have sometimes not merely refused to accept the tribunal's findings thereon as conclusive but have been prepared to determine the jurisdictional facts independently themselves.[5] And in the present case the commissioner, although an executive officer, was assumed to have been acting in a capacity sufficiently judicial to render his order amenable to review by certiorari. It must not be too readily assumed that the Judicial Committee was conclusively obliged to restrict its inquiry to the question whether there were any grounds at all for the opinion formed by the commissioner. However, in the context of a grant of emergency powers a court is unlikely to enlarge the scope of its inquiry beyond these narrow limits.

S. A. DE SMITH.

PARENT'S RIGHTS *v.* INFANT'S WELFARE

IT was recently decided in the Woolwich County Court that a putative father was entitled to refuse his consent to the adoption of his illegitimate child, although he was at the time serving a sentence of life imprisonment after being convicted of murdering the child's mother. The Court of Appeal [1] reversed this decision in *D.* (*an Infant*), *Re*,[2] and held that, even if the putative father's consent was required [3] to the child's adoption, it should in such circumstances be dispensed with as unreasonably withheld,[4] and an adoption order should be made.

The decision reached on appeal is so clearly right, and the finding in the court below seems so contrary to the intention of the adoption legislation, that the state of the law which made possible such a decision at first instance seems to call for close examination. The principle that the courts have consistently applied [5] in regard to the refusal of parental consent to adoption is that it is the attitude of the parent as a parent, in refusing his consent, that must primarily be considered, rather than the question whether the making of an adoption order would be for the welfare of the child. In other words, the infant's welfare is of an importance secondary to his parent's rights.

M., Re,[6] established that the putative father of an illegitimate

5 See esp. *R.* v. *Fulham, etc., Rent Tribunal, ex p. Philippe* [1950] 2 All E.R. 211, at 215; *R.* v. *Barnet, etc., Rent Tribunal, ex p. Millman, ibid.*, 216.

1 Of Lord Evershed M.R., Parker and Sellers L.JJ.

2 [1958] 1 W.L.R. 197; also reported in [1958] 1 All E.R. 427.

3 As "a person . . . who is liable by virtue of any order or agreement to contribute to the maintenance of the infant," under the Adoption Act, 1950, s. 2 (4) (*a*). The curious point was raised in *Re D.* that as the affiliation order which the mother had obtained against the putative father came to an end with her death, he might thereafter fail to qualify under the section as a person entitled to give or withhold consent.

4 Under the Adoption Act, 1950, s. 3 (1) (*c*).

5 See, *e.g.*, *Hiscock* v. *W. B.* [1952] 2 Q.B. 561; *K., Re* [1952] 2 All E.R. 877; *Watson* v. *Nikolaisen* [1955] 2 Q.B. 286.

6 [1955] 2 Q.B. 479, C.A.

child has no parental rights which will be lost by the child's adoption, and this principle has now been re-affirmed in *D., Re*. The rather curious result follows that, where consent to adoption is required, the welfare of an illegitimate child (which is subject to the rights of one parent only, namely the mother) comes more readily into the picture than the welfare of the legitimate child (which is subject to the rights of both parents). Indeed, the Court of Appeal held [7] that the cardinal error made by the judge in the court below lay in equating the rights of a putative father with those of the father of a legitimate child,[8] although Lord Evershed M.R. was disposed to think [9] that the consent of even a lawful father might be dispensed with if he had murdered the mother of his legitimate child and been imprisoned for life for doing so.

It is possible that the decision in *D., Re*, may shortly be absorbed into a wider legislative application of the first principle it exemplifies, namely, that even if he is bound by an enforceable obligation to contribute to the maintenance of his illegitimate child, the putative father has no right to give or refuse his consent to the child's adoption. The Children Bill, now before Parliament, provides [10] that his consent will in no case be required.[11]

As far as the rights of parents (that is to say, the father and mother of a legitimate child, or the mother only of an illegitimate child) are concerned, the Children Bill provides only [12] that the consent of the parent to the child's adoption may be dispensed with if the parent has persistently failed without reasonable cause to discharge the obligations of a parent to the child and such failure is likely to continue if the adoption order is not made. In other words the new legislation, if it comes into effect in the form as now drafted, will merely lay down certain situations which are to be deemed to constitute that " abdication of parental authority " which was one of the three grounds on which the Court of Chancery would interfere with the rights of a father over his legitimate children who were Wards of Court [13] before Parliament granted parental rights to their mother.[14]

[7] See Lord Evershed M.R. at p. 200 and Parker L.J. at p. 202.
[8] As in *Hiscock* v. *W. B.* [1952] 2 Q.B. 561.
[9] At p. 201.
[10] s. 18 (1), following the recommendation of the Hurst Committee, Cmd. 9248, para. 104.
[11] But presumably, as recommended by the Hurst Committee, where the putative father has materially contributed towards the child's maintenance or shown a genuine and continuing interest in his illegitimate child, the guardian *ad litem* may suggest that he be consulted and joined as a respondent to the application. The possibility that the putative father may be able to prevent the child's adoption by having him made a Ward of Court will apparently also remain: see *Aster, Re* [1955] 1 W.L.R. 465, and the comments of Lord Evershed M.R. in [1958] 1 W.L.R. at p. 201.
[12] In s. 18 (3), following the recommendations of Cmd. 9248, para. 120.
[13] See *Agar Ellis, Re* (1883) 24 Ch.D. 317, C.A.
[14] By the Guardianship of Infants Act, 1886 (subsequently amended.) Neglect and ill-treatment were made grounds on which a parent might be deprived of his parental rights by the Custody of Children Act, 1891.

Despite recent misinformation to the contrary in a section of the Sunday Press, the principle of the welfare of the child was also one established by the Court of Chancery, long before it was embodied in legislation.[15] It might even yet not be too late for the Chancery Division to turn its attention once more to the full development of this offspring of its experience. There is no rule that adoption by Parliament of a principle of equity severs all its bonds with the court of its origin.

O. M. STONE.

NON-JUDICIAL DIVORCES

THE case of *Manning* v. *Manning* [1] seems to have been decided as if it had involved no more than the recognition of a non-domiciliary divorce. As such it followed *Robinson-Scott* v. *Robinson-Scott* [2] in examining the facts under which jurisdiction was taken, rather than in comparing the foreign and English rules of jurisdiction. It is also of interest that Commissioner Latey seemed now prepared to abandon the suggestion, which he had made in *Arnold* v. *Arnold*,[3] that genuine and bona fide residence for a period of less than three years might be sufficient to establish substantial similarity to section 18 (1) (*b*) of the Matrimonial Causes Act, 1950.

Of far greater interest, however, is the fact that the Norwegian divorce which was recognised in *Manning* v. *Manning* had been granted, not by a court of law, but by an administrative authority, the County Governor of Bergen. This appears to have been the first reported decision concerning non-judicial divorces granted by secular authorities and it is astonishing that this seems to have escaped attention.

It has indeed been generally assumed that such divorces would be recognised but the Royal Commission on Marriage and Divorce thought that "the matter should be placed beyond doubt," [4] and it was certainly doubtful whether such divorces would come within the doctrine of *Travers* v. *Holley*. *Manning* v. *Manning* may be taken to have contributed to the solution of this question, although of course not as definitely as would have been the case if the facts had been fully appreciated. The application of the doctrine of *Travers* v. *Holley* to non-judicial divorces is, moreover, bound to raise further problems, in particular, whether recognition will be denied, under the rule laid down in *Levett* v. *Levett*,[5] if the husband has joined in applying for the divorce which is frequently required where administrative divorce is granted.

J. UNGER.

15 See, *e.g.*, *Andrews*, *Re* (1873) 8 Ch.App. 622; *Besant*, *Re* (1879) 11 Ch.D. 508. But the principle was qualified by the right of the father, as in *Fynn*, *Re* (1848) 2 De G. & Sm. 457, and *Agar Ellis*, *Re* (1883) 24 Ch.D. 317.

1 [1958] 2 W.L.R. 318; [1958] 1 All E.R. 291.

2 [1957] 3 All E.R. 473.

3 [1957] 1 All E.R. 570.

4 Para. 865.

5 [1957] 1 All E.R. 720.

LIGHT AT LAST ON DE RENEVILLE *v.* DE RENEVILLE? [1]

IN *Ponticelli* v. *Ponticelli*,[2] H, an Italian national domiciled in England, married in July, 1955, W, an Italian national domiciled in Italy, the ceremony taking place in Italy by proxy while H was in England. The marriage had been "arranged" by the respective parents. W did not come to England, where it was planned that they should make their home, until October, 1955. Almost immediately she made it clear that she did not want H as a husband, that in her opinion she had been forced into marrying by her relatives and that she was returning home. H, over a year later, sought a nullity decree on the ground of wilful refusal. W, who was represented by the Official Solicitor as she was still an infant, admitted non-cohabitation and non-consummation (for which she blamed H) but did not appear in court.

There was little evidence before Sachs J. as to the ceremony—merely that "a" [3] marriage by proxy was arranged; that a document for that purpose had been signed by H [4] and that W admitted the marriage took place. A marriage certificate [5] was also before the court. However, expert evidence showed that such certificate would be acceptable evidence of the marriage in Italian courts; Sachs J. followed *Apt* v. *Apt*,[6] applied the presumption *omnia rite esse acta*, and held the marriage valid.

Wilful refusal is a ground for nullity under section 8 (1) of the Matrimonial Causes Act, 1950, but is not a ground before an Italian civil court or consistory court [7] (unless, in the latter case, the intention to refuse existed at the time of the marriage). Sachs J. was thus faced with a choice of law problem. He referred to the suggestion in *Robert* v. *Robert* [8] that the *lex loci celebrationis* applied and to the contrary view taken at first instance in *Way* v. *Way* [9] that "the law of the matrimonial domicile governed."

[1] [1948] P. 100 (C.A.)
[2] [1958] 2 W.L.R. 439; [1958] 1 All E.R. 357.
[3] *i.e.*, it may have been either a civil, a mixed ("Concordat" marriage), or a religious marriage.
[4] Neither the original nor a copy was produced; nor was there evidence as to its contents.
[5] Which did not reveal that the marriage was by proxy. Further, Italian law required, in the present case, that the General Attorney of the Italian court where W resided should have considered whether there were serious reasons for allowing a proxy ceremony. He apparently never did so.
[6] [1948] P. 83 (C.A.), esp. at p. 88, *per* Cohen L.J.
[7] It would probably be this court which would adjudicate on this particular marriage.
[8] [1947] P. 164 at p. 167, *per* Barnard J. He did, however, consider the husband's *lex domicilii* to be a second choice. This case was overruled in the *De Reneville* case, at any rate as regards jurisdiction.
[9] [1950] P. 71 at p. 80, *per* Hodson J. (as he then was). This view, Sachs J. thought, "retains considerable persuasive force" despite *Kenward* v. *Kenward* [1951] P. 124 (C.A.) (in which the Court of Appeal held the marriage void for lack of form and thus weakened the statement of Hodson J. Evershed M.R., however, stated *obiter* at p. 133 that he was prepared to assume that Hodson J.'s view was correct) and "moreover it is reinforced by the fact that when [Hodson J.] wrote the introduction to Mr. Jackson's work on the *Formation*

He then referred to the judgments in *De Reneville* v. *De Reneville* [10] of Lord Greene M.R. and Bucknill L.J. stating that they might leave open the question as to which law should prevail should the *leges loci* and *domicilii* conflict and that they "simply tend against *lex fori.*" [11] Wilful refusal, on general principles, could not be a matter of form. "To my mind," continued the judge,[12] "the true question is as to whether it should be treated as falling within the category of matters affecting the personal capacity of the spouse, in which case *lex domicilii* (which normally coincides with the law pertaining to the country of the husband's domicile at the time of marriage) [13] applies, or whether it should be treated as something akin to matters for which the true remedy is divorce,[14] in which case *lex fori* (*e.g.*, the law pertaining to the domicile of the husband at the date of presentation of the petition,[15] or the law pertaining to the residence of a wife who may bring herself within the provisions of section 18 (1) of the Matrimonial Causes Act, 1950) [16] applies." He observed that there was no decision going the length of holding that sexual incapacity should be regarded as a matter of "personal capacity" as the term is used in *Sottomayor* v. *De Barros*,[17] quoted the views of Dicey,[18] and, relying on Denning L.J. (as he then was) in *Ramsay-Fairfax* v. *Ramsay-Fairfax* [19] held that there was no distinction for present purposes between wilful refusal and sexual incapacity [20]—a view which, he added, was implicit in the *De Reneville* [21] case. He concluded that the choice lay between the *leges domicilii* and *fori;* as to the desirability of the former he urged "that it would be unfortunate indeed if a marriage were to be held valid or invalid according to which country's courts adjudicated on the issue: and the danger of differences of that type arising is now all the more to be feared by reason of the provisions of section 18 (1) of the Matrimonial Causes Act, 1950." [22] His Parthian shot was that it was "surely

and Annulment of Marriage (1951 ed.) he stated: 'Wilful refusal being a post-nuptial fact, it is difficult to see how, for example, the *lex loci celebrationis* could have any application thereto' ": [1958] 2 W.L.R. at p. 444.

[10] [1948] P. 100 at pp. 114 and 121 respectively.

[11] [1958] 2 W.L.R. at p. 445.

[12] *Ibid.*

[13] This tends to the view of Cheshire, *Private International Law*, 5th ed., p. 307 and is against the generally accepted "dual domicile doctrine."

[14] *Cf. Inverclyde* v. *Inverclyde* [1931] P. 29, at p. 42, *per* Bateson J., approved by Lord Greene M.R. in the *De Reneville* case [1948] P. 100, at pp. 110–111.

[15] Why does he not say "English law"? Surely he cannot mean there is choice of law in divorce. Or does he mean that if there is a conflict of laws in time, this law will say whether the marriage is voidable and not the law of the domicile at marriage?

[16] Of which subs. (3) says that English law is applicable, so that there can again be no question of applying the husband's domiciliary law at the date of marriage or at the date of the petition.

[17] (1877) 3 P.D.I. (by Cotton L.J.).

[18] *Conflict of Laws*, 6th ed., p. 257.

[19] [1956] P. 115, at p. 133.

[20] *Cf. Addison* v. *Addison* [1955] N.Ir. 1, at p. 30, *per* Lord MacDermott.

[21] *Supra.*

[22] [1958] 2 W.L.R. at p. 446.

a matter of some importance that the *initial validity of a marriage should in relation to all matters except form and ceremony* (to which a uniform general rule already applies), be consistently decided according to the law of one country alone—a point of view which seems to be supported by the judgment of Bucknill L.J. in *De Reneville* v. *De Reneville*,[23] and that consistency cannot be attained if the test is *lex fori*." [24] English law, therefore, *qua lex domicilii* of the husband both at the date of marriage and at the date of presenting the petition and as the law of the intended matrimonial home—or *qua lex fori*, since he did not have finally to conclude between the two—was applicable to determine the validity of the marriage. On the facts, he granted a decree nisi.

Sachs J. appears to consider that the *De Reneville* [25] case constitutes authority for referring to the law of the husband's domicile at the date of the marriage not only the question whether impotence and wilful refusal render a marriage void or voidable, but also the question of either party's juristic capacity to marry. He is evidently also of the opinion that, so long as an English court has jurisdiction over the parties, it will in appropriate circumstances grant a decree in accordance with foreign law. Accordingly, therefore, had Count de Reneville also been resident in England and had wilful refusal and impotence been proved to render a marriage voidable by French law, the Countess would presumably have obtained a decree. Had, however, French law made them grounds for divorce only, so that the marriage was valid, then she would doubtless have failed to obtain a decree.

If the "initial validity of a marriage in relation to all matters except form and ceremony" are to be "consistently decided according to the law of the country alone" then, for example, the following unlikely results will follow: *Shaw* v. *Gould* [26] and *Baindail* v. *Baindail* [27] are wrongly decided, since the husband's antenuptial domiciliary laws (and the laws of the intended matrimonial homes) held the marriages valid; Indian law should have been referred to in *Mehta* v. *Mehta*,[28] which was not the case; the husband's domiciliary law, whatever it was, in *H.* v. *H.*,[29] which, again, was not done; *White* v. *White* [30] is correct only if there was proof in the English proceedings that the marriage was bigamous and so void by the law of the husband's domicile—which proof was lacking; and the marriage in *Re Paine* [31] should

[23] [1948] P. 100, at p. 122.
[24] [1958] 2 W.L.R. at p. 447. Italics supplied.
[25] *Supra.*
[26] (1868) L.R. 3 H.L. 55.
[27] [1946] P. 122 (C.A.).
[28] [1945] 2 All E.R. 690. In *Hussein* v. *Hussein* [1938] P. 159, the law of Egypt as to duress was never considered, although it was the antenuptial domicile of the respondent husband.
[29] *Supra.* There was, of course, never any intended matrimonial home.
[30] [1937] P. 111.
[31] [1940] Ch. 46.

have been held valid. On the other hand, we would be rid of the unfortunate decision in *Sottomayor* v. *De Barros* (*No. 2*).[32]

If, by Italian conflict of laws H is still regarded as married to W, as may well be the case, it is hard to see how application of the law of the husband's antenuptial domicile (or of the intended matrimonial home) avoids a limping marriage here. In order to protect both parties—instead of the English domiciled party only—from this result, surely our conflict rule should be that an English court, even if it has jurisdiction, should not grant a decree unless the antenuptial domiciliary laws of both parties concur in holding the marriage annullable for impotence/wilful refusal, the doctrine of *renvoi* being invoked where appropriate.

No doubt it is too late in the day to hope for such a rule to emerge, but it is fervently hoped that the Court of Appeal or the House of Lords will shortly explain that *De Reneville* [33] has nothing to do with questions of juristic capacity, fraud, duress, mistake as to the ceremony; that the choice of law rule there laid down is confined to wilful refusal and sexual incapacity; that, for the sake of certainty, the law applicable should be the law of the husband's antenuptial domicile—not the law of the intended matrimonial home since, as in *H.* v. *H.*,[34] there may not be such a home, and not the law of the husband's domicile at the date of the petition.[35]

As a matter of practice, it may now be thought desirable to prevent parties from relying on the rule that foreign law must be presumed to be the same as English so as to obtain a decree to which they might otherwise not be entitled.[36] Accordingly, where an English court suspects that foreign law is applicable, it is submitted that it should refer the matter to the Queen's Proctor for inquiry and stay the proceedings meanwhile. Otherwise this country might become a Nevada for nullity decrees.

P. R. H. Webb.

Beneficial Ownership of the Matrimonial Home Again

Repeated examination of the Court of Appeal's latest pronouncement on this vexed subject—*Silver* v. *Silver* [1]—succeeds in leaving the reader with mixed feelings. The distressing inadequacy of the traditional legal dogma brought to bear on the case, and the failure of both the court and the report to clarify some of the extra-legal factors which may have affected the decision, breed uneasiness. The recognition by a unanimous court of the most desirable approach

[32] (1879) 5 P.D. 94.
[33] *Supra.*
[34] *Supra.*
[35] The *Ramsay-Fairfax* case (*supra*) must surely be taken to overrule *Inverclyde* v. *Inverclyde* (*supra*) not only on jurisdiction but also the equation of voidable marriages to dissoluble ones.
[36] As may have been the case in *Easterbrook* v. *Easterbrook*; *Hutter* v. *Hutter* [1944] P. 10, 95, respectively.
[1] [1958] 1 All E.R. 523; [1958] 1 W.L.R. 259.

to these problems—though they did not use it themselves—creates elation.

The background was a series of matrimonial homes. The purchase of the first one largely set the pattern for the rest—a small amount of cash was paid and the bulk of the purchase-money secured by a mortgage on the property. The conveyance was taken in the name of the wife, and the husband joined in the mortgage transaction as guarantor, by depositing his life-insurance policy. When a new home was bought on three subsequent occasions, the couple adopted the same procedure—using part of the cash received from the sale of the previous home as a deposit and securing the balance by mortgage. But all the time, the husband supplied the money to pay the mortgage instalments, even though his wife was the actual mortgagor. When they separated in 1956, the husband issued a summons under section 17 of the Married Women's Property Act to determine which of them was entitled to the beneficial title in the last home bought—claiming either that his wife held the title completely in trust for himself (though he abandoned this claim in the Court of Appeal), or on trust for them both as joint tenants. With some misgivings, the Court of Appeal upheld the county court judge and found the beneficial title to be exclusively in the wife.

What, then, of the inadequacies? For a start, we can appreciate that this was a "sympathetic" decision—though the facts upon which the writer bases this suggestion are gathered at random from the report, and are never expressly emphasised by the court. It seems that, after twenty-five years of married life, the husband had *deserted* his wife. During that time, she had not been a wage-earner and now, crippled with arthritis, it was obviously too late for her to start thinking of keeping herself.[2] Further, the county court judge, who had seen and heard the parties, clearly preferred her evidence to that of the husband and though we can only guess, it is not beyond the realm of possibility that he thought the husband was trying to get something for nothing. At all events, the final result was that the wife, having *full beneficial* ownership as well as *legal* title, was left with a roof of her own and, no doubt, the continued right to be maintained by her husband.

On the main issue, it is perhaps unfair to criticise the Court of Appeal too trenchantly, both in view of what has just been said and in view of the great hesitation with which all three of the Lords Justices arrived at their decision.[3] The scheme of thought they adopted was, of course, that sanctified by *Rimmer*,[4] *Cobb*[5] and

[2] But we never learn such important details as, *e.g.*, the relative ages of the couple, or their overall relative economic positions at the time of the trial of the action.

[3] See Lord Evershed M.R. at p. 525, letter H; Parker L.J. at p. 527, letter E; Sellers L.J. at p. 528, letter D.

[4] [1953] 1 Q.B. 63; [1952] 2 All E.R. 863.

[5] [1955] 2 All E.R. 696.

Fribance [6]: they had to discover the intentions of the parties at the time of the purchase, and, as always, the difficulty lay in discovering if they had said anything *expressly*, what their *conduct* implied, and whether the circumstances justified the court's raising of the husband-wife presumption of gift. Analyses have been attempted in the past,[7] but the liberal attitude of the whole court [8] in this case shows the way to adopting an approach more in touch with realities.

What is there standing in the way of a presumption that the beneficial title to all "matrimonial joint stock" [9] is held equally between husband and wife? [10] It will be a broad and general view, but surely it will only be giving formal recognition to the fact that in most modern marriages, "nature, driven out with a pitch-fork, comes back. Despite the separation of property of husband and wife, the merger of many of their worldly possessions is and remains a fact." [11]

What, though, of the presumption of gift arising when property is placed in a wife's name by her husband—the presumption which technically decided *Silver*? As both Lord Evershed M.R. and Parker L.J. suggest, "in the case of a family asset such as the home or the furniture, acquired for the joint use of the spouses, the presumption of advancement can be easily rebutted." [12] In the present case, it was *not* rebutted because the county court judge recorded that the parties had *never* [13] intended to hold the property jointly—though he then admitted that "the matter was not raised!" [14]

Surely, in this context, a more sensible approach would be to see if there is any intention that the property be *held separately*, and if there is *not*, a presumption of joint beneficial ownership will come into play. How many times has the court recognised that married couples do not usually have any definite intentions of this kind? They do not contemplate the failure of the marriage by

[6] [1957] 1 All E.R. 357.

[7] See, *e.g.*, that of Miss Stone in (1957) 20 M.L.R. 281.

[8] The judgment of the Master of the Rolls in particular (pp. 524–527) is very forward-looking. And see *per* Parker L.J. at p. 527, letters E–F.

[9] p. 525, letter C.

[10] The writer cannot agree with Lord Evershed's suggestion (at p. 525, letter D) that if Parliament had thought that this was a fair solution, it would have provided so. In 1882, for the first time, a married woman became legally able to hold her own property. But capacity is one thing and reality another, and it was not until well into this century that the notion of a wife as a contributor to the "family assets" and a partner in the marriage, became familiar. Viewed historically, equality was the last thing that Victorian legislators would have tolerated! [11] Kahn-Freund (1952) 15 M.L.R. 133, 136.

[12] pp. 525, letter E; 528, letter A.

[13] We are to assume, of course, that the husband's claim was extemporised at the time of the action and that throughout the 25 years that he was paying mortgage instalments, he never expected to obtain any benefits!

[14] Although the court considered itself bound to accept this finding of fact, it may be observed that no fact was ever really found! At the most, the county court judge drew a rather incomplete *inference* from the facts, with which the appeal court could have disagreed on the basis of *Benmax* v. *Austin* [1955] 1 All E.R. 326.

desertion, divorce or death, or the possible division of the home between them—they only think of their future married life *together*! In *Silver*, for example, take these evidences of the "common venture": the husband maintained both himself and his wife and paid the mortgage instalments on property which *legally* did not belong to him. On the other hand, when the sale of one of the string of homes provided an unexpected windfall, the wife used it to help buy her husband a new car and to make provision for their children—all, clearly, acts done in the belief that most of the things they possessed were "theirs," and not "his" and "hers"! Where, of course, there is property that they have expressly regarded as separate property, the presumptions of gift and/or individual ownership can still apply, as Lord Justice Parker recognises.[15]

A final thought. All our modern cases on this subject have dealt with fact-situations where both spouses have made some financial contribution—however minute—to the purchase of the home.[16] But is even *this* necessary to raise the presumption of joint beneficial ownership? It is conceivable that the wife may have paid for, *e.g.*, the household expenses and the children's maintenance, and the husband paid *exclusively* for the matrimonial home. It would follow that, as the couple have expended the whole of their resources for their common good, they must both have a beneficial interest in what they have acquired. Their interests will "not depend on how they happened to allocate their earnings, and their expenditure for their joint benefit . . . and the product, should belong to them jointly."[17] Go a step further and hypothesise that a wife has no money and is not a wage-earner, but merely looks after the home and family. Is there any reason why we should not still raise our presumption of joint assets, and allow her a share in the proceeds when the family disperses and the property is sold?[18] It *is* her home; she has supplied her husband with wifely comforts, borne and raised his children, loved him, all confident in the belief that she was furthering a joint enterprise. Are we to continue to insult England's womenfolk by denying that this is a substantial contribution to the marital venture?[19]

Alan Milner.

[15] p. 528, letter B. For a recent example of a purchase of real property *exclusively* as a business venture, see *Re Knight's Question* [1958] 1 All E.R. 812.

[16] In *Silver*, the contribution of £20 by the wife's parents (apparently never repaid) may be taken as the wife's contribution.

[17] *Per* Denning L.J. [1957] 1 All E.R. 357, 360.

[18] Existing authority will have to be reconsidered sooner or later. Perhaps *Moate* v. *Moate* [1948] 2 All E.R. 486 and *Blackwell* v. *Blackwell* [1943] 2 All E.R. 579 might have been decided differently; *Re Rogers' Question* [1948] 1 All E.R. 328 has been weakened substantially by the more recent cases; while in *Hoddinott* v. *Hoddinott* [1949] 2 K.B. 406, it will be remembered that Denning L.J.'s *dissent* (*ibid.*, 414–417) contained the first comprehensive statement of the "joint venture" principle now accepted by the Court of Appeal.

[19] The case which approaches nearest to this extreme is *Dillon* v. *Dillon* [1956] N.Z.L.R. 162, in the New Zealand Supreme Court. There, however, the wife's

Capacity to Make Wills—Some Exceptions and a Rule

In *Colman, Decd., In the Estate of*,[1] Karminski J. held that, nine years after the end of hostilities with Germany, a member of the British Occupying Forces in that country might, whilst on leave in England in 1954, execute a valid will even though he was under the age of twenty-one.[2] A curious, though irrelevant,[3] feature of the case was that the will had been prepared on the advice of a solicitor in accordance with the formalities prescribed by the Wills Act, 1837, s. 9.

As regards waiver of form it might be thought that the 1914–18 war would be the last in which it would be argued that the dangers and difficulties of members of the armed forces and merchant navy differed so radically from those of the civilian population as to require special provisions for their testamentary dispositions,[4] but during and since the war of 1939–45 the operation of the privilege of formlessness has been considerably extended, both by legislation and judicial decision.[5] The foundation of the privilege, however, remains unchanged. Before anybody may claim privilege he must answer a particular description; if and only if he does so, do his circumstances at the time of making the will become relevant. Thus whether the physicist experimenting in nuclear fission, or the ballistics expert on the rocket range, is entitled to the privilege, depends on whether he is a soldier "being in actual military service"[6] or a mariner or seaman "being at sea"[6] or "so circumstanced that if he were a soldier he would be in actual military service,"[7] or a member of the Royal Air Force.[7] The sapper has

assistance included working on the filling station which comprised the home, thereby materially assisting in the conduct of the business. When they sold it, even though it was entirely in the husband's name, the court granted her a beneficial interest in half the goodwill.

1 [1958] 1 W.L.R. 457, also reported in [1958] 2 All E.R. 35.

2 In accordance with the Wills Act, 1837, s. 11.

3 A justification formerly advanced for the privilege was that, whilst on actual military service (or *in expeditione*) a soldier, like a sailor at sea, was *inops consilii*, and this argument was frequently inverted. This was part of the "Roman fallacy," under which the attempt was made to equate the privilege in English law with that granted to legionaries by the Roman law. It seems to have arisen from such a comparison attributed to Sir Leoline Jenkins after the passage of s. 23 of the Statute of Frauds. After many exposures (as by Lord Merrivale P. in *Re Booth* [1926] P. 118), the fallacy may have been finally disposed of by the Court of Appeal in *Re Wingham* [1949] P. 187, C.A.

4 *Cf.* the test of actual military service proposed by Mr. R. E. Megarry in (1941) 57 L.Q.R. p. 487: "Was the testator when he made the will either habitually serving at, or under orders to proceed to, a place in which, owing to a state of war, he would be exposed to perils of war greater than those affecting civilian life?"

5 The Navy and Marines (Wills) Act, 1939, allowed the restrictions imposed by the Navy and Marines (Wills) Act, 1865, to be dispensed with by the Admiralty, and the Act of 1865 was finally repealed by the Navy and Marines (Wills) Act, 1953. In *In bonis Spark* [1941] P. 115, a soldier killed in an air-raid on his camp in this country was held entitled to the privilege, and in *Re Wingham* [1949] Ch. 187, the Court of Appeal extended it to an airman about to be sent to Canada for training in operational duties.

6 The Wills Act, 1837, s. 11.

7 The Wills (Soldiers and Sailors) Act, 1918, ss. 2 and 4.

the privilege provided he is in actual military service; the civilian underground miner can never claim it whatever his circumstances.

The extension of the privilege not only to waiver of form but also to the conferment of testamentary capacity on minors, is a very curious story. As originally introduced by section 23 of the Statute of Frauds, the privilege could not have been construed to enable privileged minors to make wills, since there was no prohibition on the making of wills by minors. Not until the Wills Act, 1837, s. 7, came into operation was majority a necessary qualification for making a valid will. Section 11 of the Act of 1837, which merely reserved the privilege already existing for wills of personal estate, can hardly have been intended to do more than re-enact section 23 of the Statute of Frauds. Its extension to confer capacity on minors is said to be based on a decision in 1846 [8] which, however, had been generally followed [9] until, after examining the history of this construction, Younger J. refused to adopt it in *Re Wernher*.[10] The Parliament of 1918 regarded the right of infant soldiers, sailors and airmen (but no one else) to make wills as of such importance that it intervened by legislation before the decision could reach the Court of Appeal.[11] Thus the Wills (Soldiers and Sailors) Act, 1918, s. 1, laid down that the making of a privileged will had always been open to infant soldiers and sailors. In the cold light of an uneasy peace such an enactment seems more dubious than it may have appeared in the inflamed conditions of 1918.

It has been strongly argued [12] that it is a misnomer to speak of the privilege of formlessness as that of the members of the forces; the privilege is in fact exercised by those who claim their property after their death on the strength of oral statements or writings made with no attestation and doubtful *animus testandi*. When, as in *Re Colman*, the testator is a bachelor as well as an infant, the alleged privilege in regard to capacity in fact involves curtailing the right of his parents to succeed to his property on his death. It seems difficult to understand why the parents of members of the armed forces and merchant navy should be singled out for this deprivation. If *Re Colman* is not only right in law (as seems indubitable) but desirable as a matter of public policy, then the proper course would seem to be a general lowering of the age of testamentary capacity, possibly linked with the question whether the infant was self-supporting during his life.

There are already provisions by which an infant over sixteen

[8] *In the Goods of Farquhar* (1846) 4 Notes of Cases 651.

[9] See, *e.g.*, *Re Hiscock* [1901] P. 78.

[10] [1918] 1 Ch. 339, especially pp. 352 *et seq.* In that case also the will had been professionally prepared and was duly signed and attested; the only question in issue was whether a testator aged nineteen could validly exercise by it a power of appointment over £1,000,000.

[11] [1918] 2 Ch. 825.

[12] By Mr. D. C. Potter, in (1949) 12 M.L.R. p. 183.

years of age may make a valid nomination of a person to receive his savings at his death [13]; so also may infant owners of war savings certificates and national savings certificates,[14] and infant members of Friendly Societies,[15] Industrial and Provident Societies,[16] and Trade Unions.[17] Added to members of the armed forces and merchant navy, there is here an extraordinary assortment of persons who, while under age, may validly dispose of either some or all of their property at their death. Such inroads on a principle first introduced into the law just over a hundred years ago [18] suggest that it is that principle, rather than the exceptions to it, that should now be examined afresh.

O. M. Stone.

The Greek Bond Cases

National Bank of Greece and Athens S.A. v. *Metliss* [1]

Mr. Metliss was the holder of bearer bonds issued in 1927 by the National Mortgage Bank of Greece and guaranteed by the National Bank of Greece, both companies incorporated under Greek law. The proper law of the bonds was English and they were repayable in December, 1957, in London, or, at the holder's option, in Greece, by cheque drawn on London. Meanwhile interest at 7 per cent., later modified to $4\frac{3}{4}$ per cent., was payable.

However, in 1941 the Germans and Italians entered Athens and neither debtor had funds with which to honour the bonds. No interest had since been paid on them. In 1949, the Greek Government passed a law suspending all obligations on the bonds and creating a moratorium. The substantive rights and remedies of the bearers were suspended and it was illegal for the debtors to pay either capital or interest. The moratorium was renewed from time to time and was still in force at the date of the action.

If this had been all, it would not have been worth while for a bondholder to sue in this country as such a judgment would not have been enforced in Greece, and neither debtor had property within the jurisdiction on which judgment could have been executed. However, under a Greek statute of 1953, the guarantor of the bonds, the National Bank of Greece, was amalgamated by Royal decree with the National Bank of Athens. The old banks ceased to exist and "the entire property of each of them in its whole (assets and

13 Under the Savings Bank Act, 1887, s. 3, as amended by the Savings Bank Act, 1920, s. 4.

14 Under the War Loan (Supplemental Provisions) Act, 1915, as amended by the War Loan Act and the Savings Bank Act, 1920.

15 By the Friendly Societies Act, 1896, s. 56.

16 By the Industrial and Provident Societies (Amendment) Act, 1913, s. 5.

17 By the Trade Union Act (Amendment) Act, 1876, as amended by the Provident Nominations and Small Intestacies Act, 1883.

18 By the Wills Act, 1837, s. 7.

1 [1957] 3 W.L.R. 1056; [1957] 3 All E.R. 608.

liabilities) . . . is considered as being automatically contributed to the new limited liability banking company (the National Bank of Greece and Athens Company) . . . constituted by virtue of these presents, which is substituted *ipso jure* and without any other formality, in all rights and obligations of the said amalgamated banks as their universal successor." This new amalgamated company was still protected in Greece by the moratorium laws, but since the old National Bank of Athens had assets in England, the new amalgamated company became worth suing and an action was commenced in England in 1955 for interest due.

Sellers J. (as he then was) at first instance found that the proper law of the bonds was English, a finding not questioned on appeal, and he gave judgment for interest for six years before the presentation of the interest coupons for payment.[2] In the House of Lords it was conceded that the National Bank of Greece, if sued here before the amalgamation, could not have relied on the moratorium laws, but would have been held liable.[3] The main discussion was as to whether we would recognise not only the amalgamation under Greek law of two companies incorporated under Greek law, but also the universal succession by the new Greek company under the same law.

The new company, the defendants, were not party to the original bonds or to any novation of the obligation. It was argued that since the proper law governing the bonds was English, no foreign decree could modify their terms or substitute one company for another as debtor, or in other words, that we would not recognise a succession imposed by foreign law to an obligation under a contract governed by English law.

Each of the judges in the Court of Appeal and House of Lords, either directly or by reference said that the point was not covered by existing authority, but that the balance of justice and convenience required recognition.

In the Court of Appeal,[4] Denning L.J. (as he then was) mentioned that the Greek lawyers in their evidence had made it plain that their concept of universal succession was derived from the Roman concept of succession by the heir to a deceased's estate. This concept, whereby the new person steps into the shoes of the old so far as property rights are concerned, has been used in several English statutes, for instance, under the Acts amalgamating the various railway companies, the new corporation has been made to pay in full the debts of one of the former companies, which had been insolvent. It was argued that to recognise the universal succession would have been unfair to the creditors of a solvent company, such as the old National Bank of Athens, if it alone had

[2] According to Viscount Simonds, though Denning L.J. said 6 years from the issue of the writ.
[3] [1957] 3 W.L.R. at p. 1064; [1957] 3 All E.R. at p. 613.
[4] [1957] 2 Q.B. 33; [1957] 2 All E.R. 1.

assets in England, but not enough to meet the debts of both companies. Although this was not shown to be the case, Denning L.J. showed that the Romans had made provision for this in the case of succession by the heir, by allowing a creditor of either the heir or the deceased to apply to have the assets of the deceased kept separate from those of the heir. He thought that, if faced with such a problem, the English courts would also be able to devise machinery to prevent injustice between the two groups of creditors. Indeed, it is submitted that in such a case, the creditors of the Bank of Athens, to continue our hypothetical example, would be able to petition for winding up as if the old company had not been dissolved,[5] as in the Russian bank cases. From the presentation of the petition the assets would be protected under sections 227 and 229 of the Companies Act, 1948, and any subsequent disposition would be void. In the Russian bank cases, the company's assets vested in the Crown from the date of the Russian dissolution, only to be revested in the revivified company on the making of the winding-up order.[6] Presumably the only way of giving effect to the winding-up provisions of the Companies Act, compatible with the *Metliss* case, would be to treat the English assets of each company as vesting in the amalgamated company, subject to defeasance on the making of the winding-up order concerning either original company.

However, Denning L.J. did not have to decide what would happen in such a case. In most others it would be just and convenient to recognise the universal succession. Indeed the British Transport Commission's succession to the Southern Railway's property had been recognised in France. He also cited some authorities from the United States to show that there, too, a universal succession would be recognised, although there was no uniform policy on the protection of local creditors.

Romer L.J. concurred on grounds of comity; since we recognise the status and powers of a company under the law of its incorporation, we should look to the same law to discover the incidents attached to such a body, provided they were not prejudicial to the subjects of other nations. Universal succession was not repugnant to our jurisprudence, for we use a similar concept in section 208 of the Companies Act. Parker L.J. also concurred on the balance of convenience and he felt that the cases where an English court had recognised community of property between spouses and universal succession by the heir of persons domiciled abroad pointed in the same direction. He also referred to amalgamations under the Companies Act.

In the House of Lords, Lord Morton was content to adopt the reasoning of the Court of Appeal on this point and Lord Keith

[5] No judgment could be obtained against the non-existent corporation (*Lazard* v. *Midland Bank* [1933] A.C. 289, but it could be wound up as an unregistered company under the Companies Act, 1948, s. 399 (5). See Dicey's *Conflict of Laws*, 7th ed., 1958, at pp. 484 *et seq.*

[6] Dicey, *op. cit.*, p. 486.

was known to Scots law. Lord Tucker said that it was the essence also based his decision on the concept of universal succession, which of the amalgamation that the liabilities and assets should be transferred and Viscount Simonds, with whom Lord Somervell concurred, based his decision on convenience, rational justice and comity. They all found that the issue was free of authority and should be decided on principle or analogy and that convenience required the recognition not only of the status but also of the succession.

Viscount Simonds said, "It might be said that it has become a commonplace feature of commerce and industry in the modern State that such amalgamations should take place, and that it has become a matter of comity to recognise them except in so far as they are in conflict with the positive law of the country where it is sought to give effect to them. . . . I believe that justice will be done if your Lordships think it right not only to recognise the fact that the new company exists by the law of its being but to recognise also what it is by the same law. It is conceded that its status must be recognised. That is a convenient word to use. But what does it include or exclude? If a corporation exists for no other purpose than to assume the assets, liabilities and powers of another company, what sense is there in our recognising its existence if we do not also recognise the purposes of its existence and give effect to them accordingly?" [7]

With this statement, it is submitted, it is hard to disagree. Logic and authority could not solve the issue and so their Lordships considered business convenience. It might seem hard that a Greek debtor, protected from liability under the Greek moratorium laws, should be made liable on an English contract by virtue of the Greek amalgamation decree. But, as Viscount Simonds pointed out,[8] the Bank had pleaded the English Statute of Limitations. Once conflict lawyers admitted that different branches of foreign law were applied to the facts through different connecting factors, for instance that administration of a deceased's estate is decided by reference to the *lex situs*, but succession to movables by the law of the deceased's last domicile, they were involved in problems of classification. It is submitted that in this case the judges classified the universal succession to contractual liability as relating to the personal status of the corporation rather than to the contract. In a sense, of course, it was relevant both to the succession and to the contract,[9] but conflict lawyers must be referred for decision to a unique system on each issue, so the court had to decide into which category it was most desirable to place the matter. None of the judges mentioned the word classification, but it is submitted that in the absence of authority, they did in fact place the succession

[7] [1957] 3 W.L.R. 1056, at p. 1063; [1957] 3 All E.R. 608, at p. 612.
[8] [1957] 3 W.L.R. at p. 1064; [1957] 3 All E.R. at p. 613.
[9] See Lederman (1951) 29 Can.Bar Rev. 3 and 168 *passim* and especially pp. 4–14.

in the most convenient category and were refreshingly open in basing their decision on convenience.

But having decided that the new company had succeeded to the contractual liabilities of the old National Bank of Greece, the courts had to decide whether it was protected by the moratorium laws. Each judge held that it was not, because the debt was an English debt, to be discharged by English law, although the debtor was Greek. It is submitted that this again was a question of classification,[10] this time of the moratorium decrees as relating to discharge of contract rather than to the status of a Greek corporation.

It was conceded in the House of Lords that, had it been sued in England before the amalgamation, the old National Bank of Greece could not have relied on the moratorium law. It is submitted that this concession was right, as discharge of a contractual debt seems to be governed by the proper law of the contract, not by the *lex situs*,[11] the residence of the debtor.

Adams and others v. *National Bank of Greece and Athens S.A.*[12]

At first instance the *Metliss* case had been fought largely on the issue of the proper law, was it English or Greek? On July 16, 1956, four days after Sellers J. had held that it was English, the Greek Government passed a retrospective decree enacting that in amalgamation decrees, such as that of 1953, the universal succession clause should be substituted by one transferring to the amalgamated company all assets and liabilities except for liability on bonds payable in gold or foreign currency. This was too late to affect the *Metliss* case, which was concerned with the facts at the commencement of the proceedings, but other holders of bonds of the same issue commenced proceedings after the passing of the retrospective decree.

The defendant bank accepted the finding in the *Metliss* case that the proper law was English and that liability on the bonds had been transferred under Greek law until July, 1956. Diplock J. decided that the later decree must therefore be treated as discharging an existing liability and since this was contractual, it was governed by the English proper law and not by the Greek law of the amalgamation and succession. In other words, he classified the Greek decree as discharging contractual liability, not as affecting the original succession.

It had been argued that even if the 1956 decree was a law of succession, it should be ignored on the analogy of retrospective changes in the law of the domicile of a deceased person, which are

10 Diplock J. in *Adams and others* v. *National Bank of Greece and Athens S.A.*, *infra*, clearly treated the issue as one of classification and said that this was implicit in the judgment of the House of Lords.

11 Dicey, 7th ed., p. 807; *Re United Railways of Havana and Regla Warehouses, Ltd.* [1958] 2 W.L.R. 229; [1957] 3 All E.R. 641, noted by Professor Kahn-Freund (1958) 21 M.L.R. 174.

12 [1958] 2 W.L.R. 588; [1958] 2 All E.R. 3.

ignored in distributing English assets. Diplock J. said,[13] "Although Lord Penzance, in *Lynch* v. *Paraguay Provisional Government*,[14] when applying the rule to a grant of probate, appears to have based it as much on convenience as anything else, I think that probably the true basis is that which I have expressed above, namely, that a law which regulates the rights of persons who are already successors is not a law of succession, and the English courts recognise as affecting movable property locally situate in England only the law of succession of the country of domicile of the deceased."

Diplock J. expressly left open the classification of a decree which at the time of the amalgamation transferred to the new company the assets and all save a limited class of liabilities of the old companies. It had been argued that we might recognise such a succession, apart from the discriminating exception. But Diplock J., while not committing himself on this issue, pointed out that such an exclusion would not forfeit an existing right, but merely fail to create one. Should such a case arise, the courts would, it is submitted, have to decide whether the matter was to be treated as universal succession, as affecting the status of the company, or as a particular transfer of assets and liabilities, to be governed by the appropriate laws. It is hoped that the *Metliss* case would be followed: creditors would still be able to petition for winding up and so retain any existing rights to assets within the jurisdiction. Any other solution might result in great complication in administering the company's affairs.

It is understood that the *Adams* case will be taken to appeal.

V. L. Korah.

Opening the Credit in F.O.B. Contracts

"International trade has to an increasing extent over the last thirty or forty years been financed by bankers' confirmed credits," Diplock J. observed in *Ian Stach, Ltd.* v. *Baker Bosley, Ltd.*[1] "So much so," he went on, "that the classic f.o.b. and c.i.f. contracts of the textbooks providing for cash or acceptance against documents without the intervention of the banker are now probably the exception rather than the rule."

The opening of the credit is not simply a way of arranging payment for the goods; there is more to it than that, for "it creates a direct liability on the banker, independent of the contract of sale."[2] Thus, the general rule as to payment is that "unless

[13] [1958] 2 W.L.R. at p. 598; [1958] 2 All E.R. at p. 9.
[14] (1871) L.R. 2 P. & D. 268, 272.
[1] [1958] 2 W.L.R. 419, at p. 422; *sub nom. Ian Stach, Ltd.* v. *Baker Bosly, Ltd.* [1958] 1 All E.R. 542, at p. 543.
[2] *Per* Diplock J. [1958] 2 W.L.R. at p. 423; [1958] 1 All E.R. at p. 546. See too Jenkins L.J. in *Hamzeh Malas & Sons* v. *British Imex Industries, Ltd.* [1958] 2 W.L.R. 100, 102; [1958] 1 All E.R. 262, 263, cited (1958) 21 M.L.R. at p. 309.

otherwise agreed, delivery of the goods and payment of the price are concurrent conditions,"[3] so that the buyer need not pay until the seller is ready to give him possession of the goods in exchange for the price. But where a confirmed credit is to be provided by the buyer under a c.i.f. contract, the credit must be opened not later than the very first date when the seller may lawfully ship the goods, "because the seller is entitled, before he ships the goods, to be assured that, on shipment, he will get paid."[4] The seller receives no actual money until the goods are shipped and the shipping documents presented to the bank; but one object of providing for a banker's credit is to assure the seller in advance that there will be no hitch in payment.

In a c.i.f. contract it is the seller's responsibility to arrange for the carriage of the goods, and he may arrange for the goods to be shipped at any time during the period (if any) specified for shipment by the contract: the buyer is not to know that the ship will not be loading on the first day of the shipment period. But in the classic f.o.b. contract the *buyer* arranges the contract of carriage, and it is for him to notify the seller when the goods are to be shipped. It may therefore be argued that, provided the banker's credit is opened by the buyer a reasonable length of time before the actual date of shipment, he has done all that is required of him.

This was, indeed, the argument of the defendant buyers in *Ian Stach, Ltd.* v. *Baker Bosley, Ltd.*[5] The contractual shipment period was August 1, 1956, to September 30, 1956, under an f.o.b. contract for the supply of steel plates. The defendants failed to open the credit by August 14, and the plaintiff sellers wrote to them on that date claiming to treat the failure as a repudiation of the contract. On September 14 the plaintiffs resold the goods elsewhere at a price below the original contract price, and they brought the present action to recover the difference. The defendants took the view that they could not be said to be in breach of the contract for they were entitled to arrange shipment at any time up to September 30. Only if they had failed to open the credit a reasonable time before that date would they have broken the contract, and the plaintiffs' resale on September 14 amounted to a repudiation which discharged the defendants from their obligation to open the credit at all.

Diplock J. held that "in the case of an ordinary f.o.b. contract financed by a confirmed banker's credit, the prima facie rule is

[3] Sale of Goods Act, 1893, s. 28.

[4] *Pavia & Co., S.P.A.* v. *Thurmann-Nielsen* [1952] 2 Q.B. 84, C.A., *per* Denning L.J. at p. 88. Denning L.J. later suggested, in *Sinason-Teicher Inter-American Grain Corpn.* v. *Oilcakes & Oilseeds Trading Co., Ltd.* [1954] 1 W.L.R. 1394, 1400; [1954] 3 All E.R. 468, 472, that "the correct view is that, if nothing is said about time in the contract, the buyer must provide the letter of credit within a reasonable time before the first date for shipment," but this was said by Diplock J. to be *obiter*.

[5] Above, note 1.

that the credit must be opened at latest (and that is as far as I need go for the purposes of this case [6]) by the earliest shipping date." [7] He rejected the defendants' argument on the ground that it " seems to me to lead to an uncertainty on the part of buyer and seller which I should be reluctant to import into any commercial contract." [8]

In the particular circumstances of this case the decision can clearly be supported. Both parties knew that this contract was merely one of a string of contracts, the sellers having contracted to buy the steel for the purpose of supplying the buyers, and the buyers requiring the steel for the purpose of resale. The price, in the neighbourhood of £30,000, was beyond the financial resources of both parties, and the buyers looked to the banker's credit to be opened by their sub-buyers in order to open the credit in the sellers' favour; the sellers, in turn, would find it difficult to open the credit in favour of their own suppliers until they had the buyers' credit available.[9] This being so, Diplock J. could say that " the business sense of the arrangement requires that by the time the shipping period starts each of the sellers should receive the assurance from the banker that if he performs his part of the contract he will receive payment." [10]

One may, however, wonder whether this is a rule which may justifiably be applied to all f.o.b. contracts. The uncertainty feared by Diplock J. is, it seems, the uncertainty as to what is a reasonable time before the actual shipping date, and this the learned judge described as " a date which the buyer could not possibly know, because it is a date which must depend on circumstances which would not normally be known to him." [11] But in the classic f.o.b. contract the date of shipment is not unknown to the buyer, for he must negotiate the contract of carriage and inform the seller of the name of the ship and the shipping date. Furthermore, while it may be difficult for him at the time to determine what is a reasonable time before the shipping date, this concept of " reasonable time before " may well creep into the rule as laid down by Diplock J. and the rule applicable to c.i.f. contracts.[12] On the other hand, it is true that, since the seller may be called upon to ship the goods at any time after the shipment period has commenced, he must be prepared to ship at once and is entitled to the assurance of payment. And if the date is fixed as the first day of the shipment period, rather than a reasonable time before that date,

[6] The alternative view that it should be opened a reasonable time before the earliest shipping date did not require consideration in the circumstances of this case.

[7] [1958] 2 W.L.R. at p. 427; [1958] 1 All E.R. at p. 549.

[8] [1958] 2 W.L.R. at p. 426; [1958] 1 All E.R. at p. 548.

[9] A fuller description of the credit arrangements is to be found in [1958] 2 W.L.R. at pp. 422–423; [1958] 1 All E.R. at pp. 543–544.

[10] [1958] 2 W.L.R. at p. 426; [1958] 1 All E.R. at p. 548.

[11] [1958] 2 W.L.R. at p. 427; [1958] 1 All E.R. at p. 549.

[12] See footnotes 4 and 6, above.

the rule does have the merits of certainty and clarity, factors of considerable importance in such commercial transactions which may well outweigh any purely logical criticism. This is, perhaps, a situation where a rule of thumb is superior to a rule based on a conception of what is "reasonable."

Possibly, therefore, this case does not authoritatively lay down the general rule stated at the commencement of the headnotes in the reports.[13] Nevertheless, one thing is clear: the decision emphasises the value of specifying expressly, in the contract of sale, the date for the opening of the credit so as to avoid later disputes.

Aubrey L. Diamond.

Limited Interests in Chattels

The question whether a contract between two persons concerning a chattel can affect a third person who later acquires it has once again come before the courts. In *Port Line, Ltd.* v. *Ben Line Steamers, Ltd.*,[1] the plaintiffs chartered a ship on a time charter from Silver Line for thirty months from March, 1955. In February, 1956, Silver Line sold the ship to the defendants, but chartered her from them by way of demise so as to be able to perform their contract with the plaintiffs. In August, 1956, the ship was requisitioned, with the result that the charterparty between Silver Line and the defendants was terminated under one of its express terms, which provided: "If this ship be requisitioned, this charter shall thereupon expire." But the charterparty between the plaintiffs and Silver Line contained no such clause; nor was it, in the circumstances, frustrated. It therefore continued in force. The plaintiffs claimed that they were entitled wholly or in part to the compensation for the requisition which had been paid to the defendants by the Crown. The substantial question was whether the plaintiffs' charterparty with Silver Line gave them any rights against the defendants. Diplock J. held that it did not. He refused to apply the well-known dictum of Knight-Bruce L.J. in *De Mattos* v. *Gibson*[2] that "Reason and justice seem to prescribe, at least as a general rule, that where a man by gift or purchase acquires property from another with knowledge of a previous contract, lawfully and for valuable consideration made with a third person, to use and employ the property in a specified manner, the acquirer shall not to the material damage of the third person, in opposition

13 "In a contract for the sale of goods f.o.b. which provides for shipment over a period within which the buyer is entitled to call for the shipment of the goods at any time, and which is financed by a banker's confirmed irrevocable credit, the prima facie rule is that the credit must be opened by the buyer at the latest by the first day of the shipment period": [1958] 2 W.L.R. at p. 419; similarly [1958] 1 All E.R. at p. 542.

1 [1958] 2 W.L.R. 551; [1958] 1 All E.R. 787.

2 (1858) 4 De G. & J. 276, 282.

to the contract and inconsistently with it, use and employ the property in a manner not allowable to the seller" ; and he also refused to follow the decision of the Privy Council in *Lord Strathcona S.S. Co., Ltd.* v. *Dominion Coal Co., Ltd.*[3] In view of the frequent criticism to which this dictum and this decision have been subjected, the present case will, no doubt, be widely welcomed.

All the same, one cannot help feeling some reservations. Knight-Bruce L.J. based his principle on reason and justice, and none of the critics have denied that reason and justice do in fact require some such principle. What they seem to fear is that the principle may cause inconvenience. If this fear could be set at rest, might not reason and justice be allowed to prevail?

One approach to the problem is to say that a contract concerning a chattel may create a proprietary interest in it. This view is not altogether without support. Thus, there is some authority for the proposition that an option to purchase a chattel, at any rate if it is specifically enforceable, may in certain circumstances be enforced against a third party.[4] Again, a patentee can impose restrictions on the use or disposition of patented goods on a person who acquires them with notice of the restriction[5]: the important point to note in the present context is that these restrictions may go far beyond those which can be imposed by virtue of the patent itself. But these are special cases and not applications of Knight-Bruce L.J.'s principle. Rightly or wrongly, that principle was associated with the rule in *Tulk* v. *Moxhay*.[6] So long as that rule was thought to be based on the defendant's notice of the covenant, Knight-Bruce L.J.'s principle received a certain amount of support.[7] But when the courts began to stress the importance of the plaintiff's interest under the rule in *Tulk* v. *Moxhay* and finally decided that the only type of interest which would suffice was the ownership of adjacent land,[8] Knight-Bruce L.J.'s principle correspondingly fell into disfavour. Obviously adjacentness is no criterion of interest in the case of chattels, and the courts failed to evolve any other criterion. Thus, it was held that price-maintenance agreements did not bind subsequent purchasers with notice[9] and many other cases, not concerning chattels, also expressly or impliedly involved a repudiation of Knight-Bruce L.J.'s principle.[10] After these developments, it was, no doubt, surprising to find the

[3] [1926] A.C. 108.
[4] *Falcke* v. *Gray* (1859) 4 Drew. 651, as explained in *Erskine Macdonald, Ltd.* v. *Eyles* [1921] 1 Ch. 631, 641.
[5] *Incandescent Gas Light Co.* v. *Cantelo* (1895) 12 R.P.C. 262; *National Phonograph Co. of Australia* v. *Menck* [1911] A.C. 336.
[6] (1848) 2 Ph. 744.
[7] *e.g., Sevin* v. *Deslandes* (1861) 30 L.J.Ch. 457; *The Messageries Imperiales* v. *Baines* (1863) 7 L.T. 763; *The Celtic King* [1894] P. 175.
[8] *L. C. C.* v. *Allen* [1914] 3 K.B. 642.
[9] *Taddy* v. *Sterious* [1904] 1 Ch. 354; *McGruther* v. *Pitcher* [1904] 2 Ch. 306; *Dunlop* v. *Selfridge* [1915] A.C. 847.
[10] *e.g., King* v. *Allen* [1916] A.C. 54; *Clore* v. *Theatrical Properties* [1936] 3 All E.R. 483; *Barker* v. *Stickney* [1919] 1 K.B. 121.

Privy Council in the *Strathcona* case relying on this principle and regarding the time charterer of a ship as having an interest in the ship so as to make a purchaser with notice of the charterparty a constructive trustee for him. In view of the authorities, one must respectfully agree with Diplock J.'s refusal to follow this reasoning. His conclusion can also be supported on the practical ground that it is a short step from constructive trustees to constructive notice, a doctrine to be kept, as far as possible, out of commercial affairs.

On the other hand, commercial pressure for the enforcement of restrictive conditions on chattels can be very strong.[11] In the case of price-maintenance agreements, it has forced the legislature to intervene so as to make such agreements binding on purchasers with actual notice.[12] Similarly, the modern growth of hire-purchase may well create a strong demand for the recognition of limited interests in chattels. It is submitted that the decision in the *Port Line* case has not closed the door to the recognition of such interests. For Diplock J. was prepared, as an alternative reason for his decision, to distinguish the *Strathcona* case on a number of grounds, the most significant of which, for the present purpose, was that in the case before him the defendants did not have actual notice of the plaintiffs' rights under their charterparty with Silver Line. Although the defendants knew of the existence of this charterparty, they did not know that it gave the plaintiffs greater rights against Silver Line than Silver Line had against the defendants.

The *Port Line* case, therefore, does not decide that a person who acquires a chattel with actual notice of the terms of a contract affecting it may not, to some extent, be bound by that contract. He cannot, of course, be bound positively to perform the contract. But he might well be bound, on the principle of *Lumley* v. *Gye*,[13] to abstain from interfering with its performance. This suggestion, first made by Professor Wade [14] in 1926, can now be repeated with a good deal more assurance in view of recent developments in the tort of interference with contractual rights. In *B.M.T.A.* v. *Salvadori*,[15] A bought a car and covenanted with B that he would not re-sell it for one year. C, who bought the car from A within the year with notice of the covenant, was held liable to B for interfering with B's contractual right against A. It is true that in *D. C. Thomson & Co., Ltd.* v. *Deakin* [16] Lord Evershed M.R. said that in *Salvadori's* case C's conduct was " tortious in itself " [17] as it amounted to a conspiracy with A. But he did not consider that the principle of the case was restricted to conduct " tortious

[11] See Chafee, 41 H.L.R. 945.
[12] Restrictive Trade Practices Act, 1956, s. 25 (1); *County Laboratories* v. *J. Mindel* [1957] Ch. 295.
[13] (1853) 2 E. & B. 216.
[14] (1926) 42 L.Q.R. 139.
[15] [1949] 1 Ch. 556.
[16] [1952] Ch. 646.
[17] *Ibid.*, at p. 678.

in itself" for he later added: "In all these cases there was a wrongful act committed—I use that term to cover breach of contract—by the party directly induced . . . but not . . . necessarily an independent wrongful act by the party inducing, that is, an act itself wrongful apart from the tort for which he was sued."[18] In effect, *Salvadori's* case makes it possible for a restrictive condition on a chattel to bind a third party with notice. Further, in *D. C. Thomson & Co., Ltd.* v. *Deakin* Jenkins L.J. said: "If a third party with knowledge of a contract between the contract breaker and another has dealings with the contract breaker which the third party knows to be inconsistent with the contract, he has committed an actionable interference."[19] On this principle a third party may be bound negatively not only by restrictive conditions but also by limited interests and by contracts (such as time charterparties) which require the use of particular chattels for their performance. Of course, there are many cases in which the courts have not applied the principle in *Lumley* v. *Gye* when, logically, they might have done so.[20] But these were decided before the full scope of the principle became apparent and should not be allowed to stand in the way of its further development, except perhaps in situations already precisely covered by adverse authority. In particular, it is submitted that the approach to the present problem through the doctrine of *Lumley* v. *Gye* has a number of advantages.

In the first place it provides convenient, if sometimes *ex post facto*, explanations of some difficult cases. In *De Mattos* v. *Gibson*[21] the plaintiff chartered a ship which was later mortgaged to the defendant who had notice of the charterparty. The owner being unable, from lack of funds, to put the ship to sea, Lord Chelmsford L.C. allowed the mortgagee to take her free from the charterparty because "Gibson [the mortgagee] has not in any way interfered with the performance of the charterparty until it was evident that Curry [the owner] was wholly unable to perform it."[22] Similarly, the owners of the "Lord Strathcona" (the defendants in the Privy Council proceedings) mortgaged her to a mortgagee with notice of the charterparty, and they, too, could not afford to put the ship to sea. Accordingly, Hill J. permitted the mortgagee to sell the ship free from the charterparty[23]: it is interesting to note that this permission was given some four months before the Privy Council issued what was by then a futile injunction asserting the charterers' rights against the owners. In these cases, if the mortgagees interfered with the charterparties, they caused the

[18] *Ibid.*, at p. 679.
[19] *Ibid.*, at p. 694.
[20] *e.g.*, *Hill* v. *Tupper* (1863) 2 H. & C. 121.
[21] (1858) 4 De G. & J. 276.
[22] *Ibid.*, at pp. 299–300.
[23] *The Lord Strathcona* [1925] P. 143.

charterers no damage, for it was clear, quite apart from the mortgagees' conduct, that the charterparties would not have been performed. Again, in the *Port Line* case it was the requisitioning and not the defendants' conduct which prevented Silver Line from performing their contract with the plaintiffs, so that the defendants could not have been held liable on the principle of *Lumley* v. *Gye* even if they had had notice of the plaintiffs' right against Silver Line. Other cases can be explained on the ground that there can be no interference with a contract which has already been performed. A contract not to resell goods except at certain prices is performed by resale at those prices, and cannot thereafter be interfered with; and a contract to extract a similar undertaking from the sub-purchaser cannot be interfered with after it has been performed by extracting the undertaking.[24]

The second advantage of approaching the present problem through the principle of *Lumley* v. *Gye* is that it avoids inconvenience by keeping the doctrine of constructive notice out of this branch of the law. A person is only liable for interfering with contractual rights of which he has actual notice. Two dicta in *British Industrial Plastics, Ltd.* v. *Ferguson*[25] suggest that liability may be based on constructive notice. But these dicta, which were not necessary for the decision, are contradicted by other cases and dicta,[26] and are difficult to reconcile with the very principle on which, in Lord Macnaghten's view, *Lumley* v. *Gye* was based—that "a violation of a legal right committed *knowingly* is a cause of action."[27] The only difficulty which arises in this connection is due to the rule that an interference begun in good faith but continued after notice is actionable.[28] It would clearly be undesirable to hold the purchaser of a chattel bound by a contract affecting it of which he only received notice after acquisition. It is submitted that *Jones Bros.* (*Hunstanton*), *Ltd.* v. *Stevens*[29] may provide a means of escaping such a result. The defendant, having in good faith employed the plaintiffs' servant, later received notice of the contract between the plaintiffs and the servant. He was held not liable for interfering with this contract since it was clear that the servant had no intention of returning to the plaintiffs' service, whether or not he continued to be employed by the defendant. Thus, the defendant's conduct had caused no damage to the plaintiffs. Similar reasoning might well

[24] *McGruther* v. *Pitcher*, *supra*; *Dunlop* v. *Selfridge*, *supra*; in *Taddy* v. *Sterious*, *supra*, the plaintiff attempted, unsuccessfully, to establish a direct contractual relationship between himself and the defendant: he did not rely on any contract made with another party.

[25] [1940] 1 All E.R. 479, 483.

[26] *Quinn* v. *Leathem* [1901] A.C. 495, 510.

[27] *e.g.*, *British Homophone Co.* v. *Kunz* (1935) 152 L.T. 589; *D. C. Thomson and Co., Ltd.* v. *Deakin*, *supra*, at p. 694; *Jones Bros.* (*Hunstanton*) v. *Stevens* [1955] 1 Q.B. 275, 280.

[28] *De Francesco* v. *Barnum* (*No. 3*) (1890) 63 L.T. 514.

[29] [1955] 1 Q.B. 275.

protect a person who, having in good faith acquired a chattel, later received notice of a contract affecting it. The alienor's out and out transfer of the thing would at any rate be evidence that he had formed the intention of not performing the contract in any event. It would be the formation of this intention, rather than the acquirer's conduct, which would be the cause of the damage to the party entitled to the benefit of the contract.

G. H. Treitel.

Whom Should a Doctor Tell?

"In English law there must be, and is, some general conception of relations giving rise to a duty of care, of which the cases found in the books are but instances."

It can be asserted with a fair degree of confidence that, when Lord Atkin uttered these now famous words in *Donoghue* v. *Stevenson*,[1] he did not foresee that they would be made the basis on which to decide the liability in tort of a medical practitioner to his patient. But they were so employed by Barrowclough C.J. in the Supreme Court of New Zealand in *Furniss* v. *Fitchett*.[2]

The plaintiff was a married woman who, with her husband, had for some time been a patient of the defendant. The plaintiff showed some signs of mental instability. Her unfounded allegations against her husband of cruelty and violence had caused some domestic discord.

On May 21, 1956, the husband, in a distraught state, called on the defendant and said: "You must do something for me, doctor—give me a report for my lawyer." After some hesitation, the defendant gave to the husband a document in which the defendant—truthfully and correctly, as it was found—stated that, on the basis of his observations, which he set out, the plaintiff exhibited symptoms of paranoia and should be given treatment, as well as an examination by a psychiatrist.

A little more than twelve months later, an application by the plaintiff against her husband for separation and maintenance orders was heard in the Magistrates' Court. In the course of cross-examining the plaintiff, the husband's solicitor produced to her the defendant's certificate of May 21. It was then that the plaintiff for the first time learned of the certificate.

The plaintiff then began the Supreme Court proceedings against the defendant doctor. The first cause of action was for libel, which was abandoned at the commencement of the trial. The second was for breach of a duty owed by the defendant to the plaintiff. The course which the trial took showed that the plaintiff's claim was in tort and not in contract. Incidentally, nowhere in the judgment

[1] [1932] A.C. 560, at p. 580.
[2] [1958] N.Z.L.R. 398.

of the learned Chief Justice is there any explicit statement that the plaintiff had suffered any physical damage as a result of her learning of the contents of the defendant's certificate, but the frequent references in the judgment to physical injury suggest that it had been found as a fact that the plaintiff had suffered shock as a result of the disclosure to her of the contents of the medical certificate.

The learned Chief Justice said that, apart from the limitation of the doctrine enunciated by Lord Atkin to physical injury to person or property and apart from the other exceptions mentioned in Salmond on *Torts*,[3] such as the immunity from liability of the vendor or lessor of real property, he knew of no authority which precluded him in the instant case from resorting to Lord Atkin's "general concept (*sic*) of relations giving rise to a duty of care." He thought it applicable to the facts of the present case.

After reviewing the evidence and noting in particular that the defendant placed no restrictions on the use of the certificate and that it was not even marked "confidential," the learned Chief Justice said: "Dr. Fitchett ought reasonably to have foreseen that the contents of his certificate were likely to come to his patient's knowledge, and he knew that if they did, they would be likely to injure her in her health." He held that, in the circumstances of the case, particularly the circumstance that the defendant handed the certificate to the plaintiff's husband, to be given to his solicitor, the defendant owed to his patient at common law a duty to take reasonable care to ensure that no expression of his opinion as to her mental condition should come to her knowledge.

The jury had assessed damages at £250 and judgment for this amount was entered in the plaintiff's favour.

The learned Chief Justice fully appreciated that the question before him was an entirely novel one and had never been considered either in England or in New Zealand. Nor did it appear that there was any Canadian or Australian decision on this particular point. In deciding the point of law involved in the way he did the learned Chief Justice, it is respectfully submitted, has laid down a principle which is at once too wide and too narrow: too wide in that, if the learned Chief Justice's words are taken literally, a doctor might be precluded from telling even the patient what was the nature of his or her complaint; too narrow in that he would appear to restrict the duty of non-disclosure only to cases of mental illness.

The learned Chief Justice did, later in his judgment, qualify this statement, both in its expression and as to its legal effect. He said: "I have already held . . . that a doctor's duty of care to his patient involves a duty not to give *to a third party* (italics supplied) a certificate as to his patient's condition if he can reasonably foresee that the certificate might come to the patient's

[3] 11th ed., at p. 498.

knowledge and if he can reasonably foresee that that would be likely to cause his patient physical harm. But I cannot think that that duty is so absolute as to permit, in law, not the slightest departure from it."

In the light of these varying statements, it is a little difficult to say what the *ratio decidendi* of *Furniss* v. *Fitchett* is. But even if the last quoted statement represents the law, it opens dangerously wide doors. If a doctor discloses to A that A's wife is suffering from inoperable cancer and A tells his wife this fact as a consequence of which the wife commits suicide, will A have an action against the doctor under Lord Campbell's Act for the loss he has suffered? Perhaps disclosure to a husband is permitted if the husband and wife are not at the time estranged to the doctor's knowledge. These are questions for the future.

For the present, Barrowclough C.J.'s judgment is an addition to the categories of negligence which, as Lord Macmillan said in *Donoghue* v. *Stevenson*, are never closed.

A. G. Davis.

Keeping the Machine In

Rutherford v. *Glanville & Sons (Bovey Tracey), Ltd.*[1] would not require to be mentioned in this *Review* were it not for a remarkable omission in the case law cited to the Court of Appeal.

Rutherford was employed on a cutting machine incorporating an abrasive Carborundum stone, which at full power achieved 4,000 revolutions a minute. At these high speeds, there was a danger—a known danger—for the stone to explode into fragments. For this reason, a guard in the shape of a hood was provided. But, as it turned out, the guard was insufficiently strong to contain the force of the exploding stone, which lifted the guard sharply against Rutherford's wrist, injuring him.

The question for decision was whether the injury was caused by a breach of section 14 (1) of the Factories Act, 1937. The most important case on section 14 (1) is *John Summers* v. *Frost*.[2] In accordance with the criteria affirmed by the House of Lords in *Summers* v. *Frost*, the stone was a dangerous piece of machinery, since the risk of pieces flying off it against an operator was reasonably foreseeable; and the employer was guilty of a breach of section 14 (1) and Rutherford was entitled to his damages because the dangerous stone was not "securely fenced" as laid down in *Summers* v. *Frost*, *i.e.*, the hood guard did not, because of its inadequate strength, "remove the danger which would exist in its absence."

Rutherford did, indeed, get his damages, but, from a legal viewpoint, the curious feature of the case is that *Summers* v. *Frost* was

[1] [1958] 1 W.L.R. 415. Also reported in [1958] 1 All E.R. 532.
[2] [1955] A.C. 740. Noted in (1956) 19 M.L.R. 83.

not referred to at all. What was apparently cited (*inter alia*) was the dictum of Lord Simonds that the purpose of fencing under section 14 (1) is " to keep the worker out, not to keep the machine . . . in." [3] This unrealistic and artificial distinction is in conflict with the principles established in *Summers* v. *Frost*, by which it was, in my respectful opinion, overruled. But, the absence of any reference to *Summers* v. *Frost* deprived Lord Goddard C.J. of the opportunity to clarify the effect of *Summers* v. *Frost* on the Simonds dictum. Instead, the Lord Chief Justice set that dictum on one side by making a factual distinction.[4]

The interpretation of section 14 (1) in *Summers* v. *Frost* is a definitive interpretation which should now be applied in all relevant cases. It is hoped that the inadvertence of counsel will not create in this important branch of the law complications that are both unnecessary and unjustified.

C. Grunfeld.

Summary Judgment

The nature of the remedy of summary judgment under Order XIV of the Rules of the Supreme Court is well illustrated by the Court of Appeal's judgment in *Les Fils Dreyfus et Cie. S.A.* v. *Clarke*.[1] Although reported cases on Order XIV are now relatively uncommon, a considerable volume of court work—heard almost entirely before the Masters of the Queen's Bench Division, the District Registrars and the Judge in Chambers—is conducted every year. The figures for 1957 show that of 4,521 Masters' Summonses for summary judgment final judgment was given in 1,971 cases, over 600 of which were for amounts exceeding £400.

The plaintiffs in the *Dreyfus* case were assignees of a debt of £10,000 which had already become payable to the assignors. The Master gave leave to the plaintiffs to sign final judgment, but on appeal Havers J. held that the original affidavit by a director of the plaintiff company did not verify the assignment and had not been cured by subsequent affidavits placed before the court. Havers J., therefore, held there was no jurisdiction to hear the summons and dismissed it with costs.

It is pertinent to observe, parenthetically (although the Court of Appeal was not concerned to deal with it), an unusual rule concerning the right to appeal in these cases. Section 31 (1) (*c*) of the Supreme Court of Judicature (Consolidation) Act, 1925, provides that no appeal shall lie to the Court of Appeal " from an order of a judge giving unconditional leave to defend." It was, thus, only the dismissal of the summons that gave the plaintiff company the right to appeal to the Court of Appeal. Had the learned judge

[3] *Carroll* v. *Barclay* [1948] A.C. 477, at 505.
[4] At 417.
[1] [1958] 1 W.L.R. 200; [1958] 1 All E.R. 459.

considered the defective affidavits in regard to the merits of the case and given unconditional leave to defend, the plaintiffs would have been unable to appeal. Consideration might perhaps be given to the restoration of the right of appeal in these circumstances, which was abolished by section 1 (3) of the Supreme Court of Judicature (Procedure) Act, 1894.

Parker L.J. who delivered judgment in favour of the plaintiffs, thereby restoring the Master's order (Sellers L.J., the other member of the court, did not deliver a judgment), held that while the plaintiffs' affidavit was defective, it could be and had been cured. In so holding, it was necessary for the court to consider a passage in the *Annual Practice* which has appeared in editions of that book since 1890. The passage in the 1958 edition states [2] that an affidavit in support of the summons for summary judgment must be produced before the summons is issued. The statement concludes that the decision in *Begg* v. *Cooper* [3] which decided to the contrary, has not been acted on in practice and "was so disregarded on this point by authority." The *Dreyfus* case has now restored *Begg* v. *Cooper* to its rightful place as correctly stating the law. This will prevent occurrence of instances where the order room has been known to reject a summons unless and until an affidavit in support was produced.

L. J. Blom-Cooper.

[2] p. 246
[3] (1878) 40 L.T. 29.

REVIEWS

A History of English Criminal Law and its Administration from 1750. Vol. 2. The Clash between Private Initiative and Public Interest in the Enforcement of the Law: xvii, 427, 105 (appendices), 84 (bibliography) and 128 pp. (tables of cases and statutes, and index). Vol. 3. Cross-Currents in the Movement for the Reform of the Police: xvii, 474, 100 (appendices), 60 (bibliography) and 54 pp. (tables of cases and statutes, and index). By Leon Radzinowicz, ll.d.(Cantab.), ll.d.(Cracow), ll.d.(Rome). Published under the auspices of the Pilgrim Trust. [London: Stevens & Sons, Ltd. 1956. £4 4s. net each volume.]

With no *mens rea* of blasphemy, the words of Francis Thompson can be appropriately applied to Dr. Radzinowicz. "With unhurrying chase, and unperturbèd pace, deliberate speed, majestic instancy," he pursues his aims "down the arches of the years" and "down labyrinthine ways" of which the seven-score pages of bibliography in these two volumes are an impressive record.

Though separated and differently titled, these two volumes in fact cover the same topic, the long and tortuous paths which had to be trodden to reach a tolerably rational and efficient system for the enforcement of public order and criminal justice in this country. A subject of such multiple facets and voluminous record must, of necessity, involve the expositor in complicated problems of presentation. It could be no tolerable criticism at all of these two volumes to say that the development of the theme has required the acceptance of a ground-plan exhibiting some repetitions, overlaps and chronological fluxes, or to complain that Dr. Radzinowicz has so far—and it is only so far—had to content himself with relying predominantly on the historical records relating to the Metropolis. In all conscience, quarrying even that Himalayan pile must have been an almost Herculean task. The records of the Provinces must await the hour dictated by human limitations. The writing of history has not yet become the product of the electronic computer.

The first of these two volumes describes the enforcement of the criminal law in the eighteenth and early nineteenth centuries on the basis of *laissez-faire*, through the agency largely of private initiative and by reliance on the appeal to self-interest. The gibbet and allied severities stemmed not the growing tide of lawlessness. Divers public and private movements, of laudably pious intention, for the reformation of morals and manners made the flimsiest of dykes even at the height of their transient glories. Various attempts to control the movements and the habits of the more mischievous elements of society likewise failed. A society without adequate machinery of self-protection by law enforcement sought relief in the appeal to self-interest by a diversified system of rewards calculated to bring crimes to light and criminals to justice. It tried everything on those lines—pardons for scab accomplices; monetary rewards by Act of Parliament and by public and private advertisements; rewards by the State; rewards by corporate bodies, associations and private victims of depredations; the exaltation *in excelsis* of the common informer; the blandishments of exemption from parish and ward duties on "the Tyburn Ticket" (which almost became a species of negotiable instrument!); the negative appeal to self-interest by the system of pecuniary sanctions against negligent constables and against communities (not entirely an archaic device even in our day!). These and other methods are described in great detail by

Dr. Radzinowicz—and their failure was great. Where one Evil Spirit was exorcised, seven more took its place, and did so very often through the instrumentalities of exorcism!

Against this depressing background of inadequate palliatives, Dr. Radzinowicz proceeds to describe the contemporaneous structure of the civil police force, woefully inadequate to cope with its tasks, a tangle of independent establishments involving, both in the police offices and in the persons and duties of the Stipendiary Magistrates, an impracticable combination of executive and judicial functions. It was a system in which "nobody was answerable for anything," without design or unity, creating enervating and frustrating antipathies and rivalries. Such an establishment of necessity led to the creation of a variety of supplementary protective devices by victimised groups and associations. It led (not once or twice in this fair Island's story!) to reliance on the "home-guard" of special constables in time of acute emergencies.

A police structure based on a ramshackle system of emoluments under which the basic salary was only a sort of retaining fee and which relied on a system of special rewards as incentives to improved vigilance and activity naturally encouraged every conceivable racketeering abuse in a universal twilight between legality and illegality. (Members even of the much lauded Bow Street Runners left private fortunes of £20,000 or £30,000.) Occupations ancillary to police duties were rampant; looseness of discipline was endemic in all ranks; the wages of connivance at crime were inflationary of corruption; incentives indistinguishable from temptations bred a widespread system of division of spoils. Like the rabbit-catcher who ensured that he did not exterminate the source of his income and even introduced fresh strains to improve his harvest, the police were more interested to keep open the channels of crime than to close them. The forces of justice themselves benefited by becoming the agencies for the compounding of felonies—on the justification that that alone would ensure the restoration of stolen property. Crimes were encouraged with a view to reward for trapping the criminals. Police perjury was rampant.

This, in the briefest outline, is the sort of picture voluminously thrown on the widest of cinemascope screens by Dr. Radzinowicz. The gloom of Volume Two is practically unrelieved until we reach its very last part, where the author begins to portray some early reforms. The most notable, perhaps, was the intervention of the West India merchants in the establishment of the Marine Police of the Port of London, following on the majestic surveys and activities of Colquhoun. Another was the tardy but growing appreciation of the hampering effects of widespread divided controls of the police and the incipient steps towards centralised control directed in the first place towards the magistrates of London and their establishments, and the first moves to bring parts of the metropolitan forces under the direct control of the Home Office.

From this concluding point of the second volume, the third moves both backwards and forwards to delineate the history of police reform. It would be a little difficult to fix the exact chronological *terminus ad quem* of this volume, but perhaps it could be fairly fixed about 1828, although parts of the chapter on Chadwick reach to later times. Dr. Radzinowicz starts with the extensive and diversified efforts and activities of the two Fieldings. This is territory pretty well surveyed before, but a resurvey of it had to be done to complete the picture. Then follows a description of the reforming legislation (albeit very inadequate and indecisive reform) of the period 1750–80. Then came what the author calls "the ebbing enthusiasm for police reform" after the Gordon Riots, a period of confusion of ideas and aims when emphasis on alternative methods militated against the central issue of police reform—when serious minds more than toyed with ideas such as the revival and extension of the *posse comitatus*, reliance on a militia instead of on the police, schemes of local self-help, and so on. It was in this period that A. G. McDonald's notable London and Westminster Police Bill of 1785 was

lost in England but found acceptance in Ireland, to become later, by its success there, a pattern of reform and an impetus to it on this side of the Irish Sea. Seven years later came the Middlesex Justice Act, 1792, which at least had the merit of reforming the magistracy, if not the police.

Historians of times of degeneracy (which means all periods!) cannot neglect the activities of moral reformers. Dr. Radzinowicz does them very fair justice, though historians of Methodism may, perhaps with some justification, feel that Wesley deserves more attention than he gets as compared, say, with Wilberforce. (Augustine Birrell in his day asked a Cornishman why parts of Cornwall were so sober and got the reply, "A man called Wesley once came this way!") But Wilberforce, the Clapham Sect, the Societies for the Suppression of Vice and Encouragement of Religion, Methodism and other basically non-political movements are faithfully observed. Nor does Dr. Radzinowicz fail to underline the recurrent tendencies of such movements to become identified with the maintenance of the existing régime. In particular, Wilberforce's more reactionary moments damned his more pious intentions in the eyes of many powerful and enlightened liberal minds. The sins of the lower orders so frequently prevent recognition of the higher degeneracy.

In this broad tapestry exhibiting representations of gross inertia, inefficiency, confusion of mind and motives, and practically every other form of human frailty, the energetic and practical figures of a few imperial minds stand out in majestic proportions and colourful relief. Perhaps the greatest service performed in these two volumes lies in the delineation of the work of Patrick Colquhoun—a subject too great for adequate emphasis in this review—with his insistence on the connection between indigence and crime and the necessity for police reform concurrently with a critical review of the whole penal system.

For a short time at the very end of the century it seemed that the dawn of vigorous reform was at hand, but there soon recurred one of those well-nigh inexplicable periods of inertia which even the shock of the Wapping Murders in 1811 could not effectively disturb. Later, between 1816 and 1828, came a spate of official committees and reports without much immediate practical consequence. This period saw the curiosity of outstanding reformers of the Criminal Law itself, men like Romilly, Macintosh and Brougham (but not their mentor Bentham), in a very Laodicean mood about police reform. Bentham brings us to Dr. Radzinowicz's description of "the challenge of the Utilitarians" to the orthodox attitudes towards the police problem exemplified by Blackstone, Adam Smith and Paley. Despite the eccentric fluxes of his mind (shown by his partiality for informers, spies and other such stratagems), Bentham did at least appreciate the problem of control of the police. But more decisive than the efforts of the master in this direction were the efforts of the disciple, Edwin Chadwick, who stayed on the Victorian stage from its start practically to its end. Dr. Radzinowicz's exposition of his work stands second only in value to his treatment of Colquhoun.

This is but a brief indication of the contents of these volumes. It can convey no idea of the detailed exposition of them or of the magnitude of the study of voluminous records on which it is based.

In reading a history of this kind an almost inevitable inclination is to indulge in amazed censoriousness of the frailties of our great-great-grandfathers. "In retrospect and in the ease of the plains of Canaan, how easy it is to pontificate on how much better the march through the wilderness could have been ordered." History always marches forward, but the writing and reading of it always have to march backward. It is so fatally easy to read modern notions, attitudes and experiences backwards into earlier epochs without any full appreciation of the contemporaneous scene which dictated the views and activities of the actors in it. An even more difficult task is to estimate the balances between the gains and losses to human society which flowed from particular attitudes and concepts paramount at some given period of history. Dr. Radzinowicz has striven hard to explain the whys and the wherefores of some of the attitudes which led to blindness or lukewarmness about police

reform. It was not his task in these volumes to essay the second task of estimating the compensations, in other directions, which may have flowed from the orthodox suspicion of a too efficient police system. Happenings on the European stage in the twentieth century may help us better to appreciate the reality of those fears and the validity of some of those suspicions. Human limitations being what they are even in the twentieth century, we can still acclaim men like Romilly and Brougham as kings and emperors even if they were not universal monarchs.

Whether History is viewed from China to Peru or, as in these volumes, on some limited sector of it, the Carlylean hero seems to be coming back into his own. Demos, no doubt, is great and shall prevail, but the inevitable inference all the time is that it will be in pretty poor shape without its Fieldings, its Colquhouns and its Chadwicks as well as its Pitts, Romillys, Broughams and others in the centre of things. And another reflection prompted by these volumes is that there is the devilry in all human affairs of the differences in the perspectives of the centre and the periphery. Bringing the front-room and the back-room boys into alignment is a problem which is still with us—and it may well become more, not less, difficult. And the difficulty may not always rest in the limitations of the front-room boys.

Where there is so much to laud, it is almost churlish to express any doubt. But candour compels the question whether the bulkiness of the first three volumes of this history is not such as to frighten away the wider audience which its merits should command. Were this bulkiness universally emulated, one continent would have to be set aside to grow the timber for the book-shelves of the rest. Two things combine to produce it. First, the size of the print and the spacing of it are very generous. (And in these two volumes there are no less than fifty pages which are either totally blank or which only carry a title.) Secondly, it must be suggested with great respect that the contents could be streamlined and pruned without the slightest loss of anything of historical worth. (Chapter 13 of Volume 3 presents good examples.) The bibliography is most valuable and deserves this permanent form of preservation; but were two hundred pages of appendices *really* necessary? (Even Holdsworth was generally content with no more than about thirty pages a volume.) Much slimmer volumes at a much cheaper price would surely attract more buyers; at four guineas a volume there is a danger that this most valuable work becomes the ornament of public libraries only. At the present price one has a feeling that one is being cheated of the luxury of pictorial illustrations of the underworld which Dr. Radzinowicz describes—like Phiz's depiction of a "Flash-House"!

But in these days of austerity it is perhaps good for our souls to have publications on such generous lines. The author and the publishers most certainly deserve the very highest credit for the meticulous care they have shown. All students of the English Criminal Law and its history must look forward with lively anticipation to the continuance of the beneficent labours of Dr. Radzinowicz and to the succeeding volumes.

D. R. S. D.

The Offenders. By Giles Playfair and Derrick Sington. [New York: Simon and Schuster. 1957. $3.95.]

The frustrations of the proverbial beast of burden in its efforts to go the way of all thread are as nothing to the inability of the ardent controversialist to be objective. So far as moral obloquy goes, the authors of *The Offenders* have been at great pains never to be less than fair to the point of view alike of the punisher and the punished. So far as justification is concerned, they see nothing but error, in principle and in practice, in the infliction of the death penalty. Condemning it only incidentally for its barbarity, they attack it mainly as an anachronism and a sham, as belonging to "a penal system based on indiscriminate violence" (p. 273).

The case which they present is a powerful one. The illustrations with which they support it are vividly drawn. There is the double murderer, whose maniacal viciousness qualified him for, instead of saving him from, the English gallows. Behind the recital of his case is the implication that insanity, as a matter of evidence, depends on little more than whether the forensic psychiatrist regards him as a "twerp" or not (pp. 26, 27). Immunity which he should enjoy on account of actual want of responsibility for his own conduct is shown to be no more than a hypocritical theory. By way of contrast, the reader is given a picture of a vicious young psychopath, an immigrant to America, who had escaped the death sentence because his many crimes of violence had stopped short of killing. Of his tale the moral is that even such a character as that can be tamed by firm kindness. Taken to view the problem from a different angle, the reader is then shown another American case in which a completely reformed multiple murderer is still, after well over forty years, frittering away a studious and valuable life in hopeless captivity. This is presented to illustrate the cruel futility of keeping a man alive by merely refraining from putting him to death.

There follows another striking contrast. Here you see a Swedish youth, a waster and a rotter, who gratifies his distorted impulses by committing a peculiarly revolting murder. His case is handled as scientifically and unemotionally as the performance of a surgical operation, with the apparent result that he is now steadily qualifying for a normal place as an ordinary citizen.

From crimes of violence the authors then turn to capital offences of a different kind. The lights are focused on the trial and execution, by a British military court, of the healthy young peasant girl who took a vigorous part in perpetrating inhuman cruelties on the victims of Nazi brutality. She is shown as the pupil and subordinate of men whom she grew up to idolise as heroes; and from that angle too the question of personal responsibility for crime is then discussed. More than this, the case is made use of to explore the far wider questions as to the justice, the appropriateness, the efficacy and even the real motive in inflicting the death penalty in such circumstances.

Back again to the United States, the authors wind up with what they present as the culminating judicial crime. Retiring for a better leap, they begin by disclaiming any conviction that the small middle-class husband and wife who went after long and agonising delays, to the electric chair, were guiltless of having betrayed vital secrets to the Soviets. They do question the legality of applying the death sentence for betraying in time of peace their country's secrets to a war-time ally. But neither that, nor the possible veniality of such an offence when committed in pursuance of what the offender misguidedly believes to be in the ultimate interests of humanity, is the point which the authors primarily stress. What they are at pains to prove is that the death penalty is even less appropriate in a case of treason than it is for the punishment of murder.

This, in particular, is the point at which the zeal of the controversialist would seem to override the cold objectivity of the scientific investigator. The authors appear to postulate as an indisputable fact (or quite as questionably, as a proposition which their illustrations prove) that neither deterrence nor retribution should have a place in a modern penal system. Although they are not always consistent in this, they seem often to reason on the assumption that the primary if not the sole, object of deterrence is to deter the offender himself from repeating his offence, and that retribution is to be equated with vengeance. To argue that the extreme penalty is demonstrably unnecessary as a measure to deter a convicted traitor from acting treasonably again, convincing as it is, does not touch the far more cogent contention that the fear of the death penalty may perhaps be the only inhibition which prevents would-be traitors from ever committing treason. Similarly, in relation to retribution, to convince the reader of the evil of putting irresponsible people to death for the sake of gratifying a desire to wreak vengeance on them, leaves

unchallenged and in possession of the field the principle that no law can stand against unchecked defiance. If that principle and its justification, and not vengeance, is the true nature of retribution, then the authors' attack on the element of retribution in punishment misses its mark.

But to offer this criticism is very far from suggesting that the many other penetrating arguments advanced by the authors are not perfectly valid. It is only right to say that they do not profess to approach the topic dispassionately. The sub-title of the book is, indeed, "The Case Against Legal Vengeance." Having thus chosen so question-begging a windmill at which to tilt, it is no wonder that their arguments appear at times as special pleading, and lose thereby a certain measure of cogency. Nevertheless, when every subtraction has been made, and every objection has been allowed, this book remains a very formidable indictment of the entire conception of judicial killing, regardless either of the offence or of the circumstances. If it were as convincing on the constructive side as it is in its condemnation, it would indeed make a very notable contribution to penology. The authors do not shrink from suggesting ways in which some of the cases still subject to sentence of death might effectively be treated otherwise. But they neither succeed in offering, nor even profess to offer, a completely defensible solution to the problem of dealing effectively with murderers or with traitors. All that they set out to achieve is to establish that killing them affords no solution at all.

The two Englishmen, with their American foreground, who have published this work in the United States, have certainly succeeded in producing a stimulating and exciting book. They consciously and deliberately state their arguments "implicitly, and dramatically" (p. vii), and in doing so they have achieved something which should prove both attractive and instructive to a wide range of readers. In particular, anyone engaged in the administration of justice who omits to read this book will have neglected a valuable contribution to his higher education.

Walter Raeburn.

Evidence. By Rupert Cross, m.a., b.c.l., Fellow of Magdalen College, Oxford. [London: Butterworth & Co. (Publishers) Ltd. 1958. lxxii and 496 and (index) 18 pp. £2 15s. net.]

This scholarly work is a welcome addition to the modern literature on the law of evidence. The learned author, who lectures on the subject at Oxford, himself answers the unspoken question—what gap does the new book fill in the shelf of books on evidence? He explains in his preface that he hopes to have supplied students and practitioners with a work which will take a middle place between those of Stephen and Phipson; that he has catered for students by including a good deal more theoretical discussion than is customary in the case of a book designed solely for the practitioner, and for the latter by including many more cases in the footnotes than any student would wish to consult. As with any new book, it is difficult to estimate the utility of this work to the profession; but the post-graduate student should certainly find much assistance in the elaborate consideration of academic problems, such as the privilege in respect of allegations of more than one act of adultery (pp. 234–236), the admissibility of illegally obtained evidence (pp. 259–266) and the use in civil proceedings of a party's previous conviction (pp. 340–347).

The arrangement of a book on evidence is not dictated by any natural division of the subject, and is therefore largely a matter of personal preference. This book is divided into eighteen chapters. Chapters 1 to 3 comprise an introduction, examples of circumstantial evidence, and the functions of judge and jury. The burden and quantum of proof, with presumptions, occupy Chapters 4 to 6. Chapter 7 is concerned with judicial notice, formal admissions and estoppel. Oral evidence is the principal theme of Chapters 8 to 14, which deal respectively with the competence and compellability of witnesses, the

course of evidence, privilege, public policy, disposition and character, the Criminal Evidence Act, 1898, and evidence of opinion. Chapters 15 to 17 discuss hearsay and the exceptions to the rule of exclusion. Documentary evidence is the subject of Chapter 18. If any comment were to be made on this arrangement, it is that the length of the last chapter of thirty-seven pages, of which twenty-six are devoted to parol evidence of documents, seems scarcely commensurate with the importance of the subject in the civil courts, though in fairness it must be added that the two previous chapters include sections on public documents and the Evidence Act, 1938.

There is little that calls for comment in Mr. Cross's statement of the law, for it does not differ in substance from that in other modern English books on evidence. But is it certain that the laws of Northern Ireland and Eire are foreign law (p. 47)? Perhaps the citation of relevant statutory provisions is somewhat meagre and should be augmented, at least for practitioners. In preparing the next edition the author might also care to reconsider some minor points, such as the statements that irrelevant evidence is hardly ever tendered (p. 15), and that confessions are excluded altogether under the Indian Evidence Act, 1872 (p. 438), as well as the question whether the nature of the so-called secondary evidence of Lord St. Leonards' will did not justify criticism (p. 417). Could not English authority be found for the proposition (p. 347) that a plea of guilty may be proved as an admission? Numerous references to the American Model Code of Evidence of 1942 might be supplemented by citation of the Uniform Rules of 1953. The reader is likely to be irritated by the author's practice of mentioning a matter, and then stating that nothing need be said about it (*e.g.*, pp. 399, 404, 408, 412). The citation of the Medical Act, 1950 (p. 344), is presumably a misprint for the Act of 1956. There are other printers' errors, including the names of cases (pp. 39, 123, 124, 266, 470), judges (pp. 109, 148, 294) and authors (pp. 114, 117, 119, 340).

Definition and terminology are perhaps the least satisfactory part of this book. Judicial evidence is said to consist of "the testimony, hearsay, documents, things and facts which a court will accept as evidence of the facts in issue in a given case" (p. 1). The inclusion of hearsay is justified by an artificial definition of testimony (p. 3). Yet hearsay can only be adduced through oral testimony as usually understood or through documents; facts require to be distinguished from the means of proving them; and judicial evidence is not confined to the facts in issue, despite a somewhat unconvincing argument to support the contrary suggestion (pp. 5, 6). Much as one may admire some of the work of some foreign writers on evidence, appreciation of American aid might stop short of the importation of Wigmore's "prospectant," "concomitant" and "retrospectant" evidence into an English book (pp. 23, 25–32). It is also unfortunate that the dubious distinction between a "persuasive" and an "evidential" burden of proof should be given further currency (pp. 63, 64); for, as the reviewer has shown elsewhere (5 I.C.L.Q. at pp. 360, 361), the distinction is misleading if not inaccurate. Mr. Cross's complete formulation of the rule against hearsay deals with "assertions of persons other than the witness who is testifying . . ." (p. 360). But, apart from the controversial inclusion of testimony on former occasions (p. 442), this formula is open to the objection that a general rule must be wide enough to cover all the exceptions to it, and the rule stated omits some documentary hearsay; for example, copies of various public documents or an original medical certificate, admissible under the Evidence Act, 1938, s. 1 (5), may be put in when no witness is testifying and without any oral evidence at all. The author proposes to amend the "definition" of real evidence in the reviewer's book on evidence. In a chapter headed "Things" the reviewer wrote, "real evidence, therefore, may be described as any thing, other than a document, which is examined by the tribunal as a means of proof." Mr. Cross would add the words in italics as follows—"real evidence is anything other than *testimony, admissible hearsay or* a document *the contents of which are offered as testimonial evidence* . . ."

(p. 10.) These emendations, which seem to be partly due to misreading the two words "any thing" as "anything" (p. 8), are superfluous and unacceptable. Neither testimony nor admissible hearsay is a thing according to customary English usage, and therefore neither requires express exclusion. Again, since the reviewer distinguished documents as things from documents as writings, the proposed qualification of "document" is also unnecessary.

But differences of opinion as to detail should not obscure the general merits of Mr. Cross's book. The work is comprehensive in treatment, dealing with all the principal topics usually considered in a volume on evidence. It is thorough in presentation, discussing numerous cases and setting out extracts from various judgments. It is elaborate in exposition, calling in aid decisions from other common law jurisdictions and Scotland when English authority is sparse. And it is direct in style, explaining the law with lucidity.

G. D. Nokes.

The Constitutional Law of Great Britain and the Commonwealth. By O. Hood Phillips. Second Edition. [London: Sweet & Maxwell, Ltd. 1957. xl and 836 pp. £2 5s. net.]

Leading Cases in Constitutional Law. By O. Hood Phillips. Second Edition. [London: Sweet & Maxwell, Ltd. 1957. xx and 466 pp. 38s. 6d. net.]

This by now well-known and much-used text has a genealogy of almost Hapsburg complexity. D. H. J. Chalmers published his *Outlines of Constitutional and Administrative Law* in 1910, a modest little book of 263 pages. In 1922, a second edition appeared, edited by the Hon. Cyril Asquith, and entitled *Outlines of Constitutional Law, with notes on legal history.* Third, fourth and fifth editions of *Chalmers and Asquith* appeared in 1925, 1930 and 1936, with the page-count steadily rising to 528. In 1946, in the sixth edition, *Chalmers and Asquith* became *Chalmers and Hood Phillips,* and the title was changed to *Constitutional Laws of Great Britain, the British Empire and the Commonwealth.* Six years later, Professor Hood Phillips published a book with the title of the present volume [1]; it was described as "in effect a revised edition" of Chalmers and Hood Phillips (1946); it appeared with the name of Mr. G. Ellenbogen, M.A., on the title page, in addition to that of the present author, and the acknowledgment "Founded on *Chalmers and Hood Phillips.*" It was left to the librarians to decide whether to describe this as a seventh edition or a first. Professor Hood Phillips now resolves their dilemma; he has wisely decided to break with the past and to treat the text as his own; we are to regard the volume under review as *Hood Phillips,* second edition; the page-count stands at 836.

The text of the first edition has undergone considerable revision, as the author describes in his Preface. The separation from Part III of the chapters on Local Government, Public Corporations, Delegated Legislation, Administrative Jurisdiction (the former Chapter 22), Legal Liability of Public Authorities and Remedies against Public Authorities into a separate Part IV, entitled "Administrative Law," is realistic and sensible, and the author was able to add in an Appendix a useful summary of the Report of the Franks Committee.

The chapter on the Sovereignty of Parliament has been rewritten in the light of the South African case of *Harris* [2] and *MacCormick* v. *The Lord Advocate,*[3] but in this reviewer's respectful opinion Professor Hood Phillips

[1] For reviews, see 69 L.Q.R. 425 (Monteith), 11 Camb.L.J. 499 (Thomas), 15 M.L.R. 527 (de Smith).
[2] 1952 (2) A.D. 428; [1952] 1 T.L.R. 1245.
[3] 1953 S.L.T. 255; 1953 S.C. 396.

does not give sufficient weight to the light which *Harris* may be thought to throw upon the operation of "manner and form" provisions of fundamental law. This is not the place for another long discussion of this stimulating decision, but the reviewer may be permitted to mention his own conviction that thought on this matter is clarified by making one's initial question "Is there a fundamental law in the United Kingdom?" (a "Grundnorm," if you like, providing for the manner in which and the forms through which legal authority is to be exercised within it), rather than the traditional "Is Parliament sovereign?"; and he would draw readers' attention to Marshall's *Parliamentary Sovereignty and the Commonwealth* (1957), published too late for reference to be made to it in this edition, in which the whole problem is examined and a detailed and fascinating case study presented of the South African controversies. Professor Hood Phillips is right to note that the question of *remedies* in this field is quite another matter. Would an English court take any action, even if it was demonstrated that a fundamental "manner and form" provision had been disregarded? In the reviewer's opinion, this is a question which is concerned simply with the proper relationships between two "arms of government," Parliament and the courts, and has little to do with any doctrine of the sovereignty of Parliaments; he would therefore, with respect, regard as irrelevant the discussion of *Trethowan's*[4] case by Evershed M.R. in *Harper* v. *Home Secretary*,[5] a case which Professor Hood Phillips mentions elsewhere in his book but not (somewhat surprisingly) in the section now under consideration. On this view of the matter, it remains arguable (it is submitted) that, despite the objections to remedy by injunction, the remedy by declaration should be available.[6]

Part VII on "The Commonwealth" (no longer "British") has new chapters on Ghana and the Federation of Malaya. The author's desire to discuss the pre-1947 constitutional provisions for an undivided India—a very necessary background to the present constitutional law of both India and Pakistan[7]—still means denying these two Commonwealth countries a chapter apiece. Since publication of the first edition, Pakistan has become a Republic, and one is tempted to wonder if this has anything to do with the fact that, in the order of chapters, Ceylon now takes precedence over India and Pakistan; this reviewer will watch with interest for further chapter shuffling in later editions. The list of "Contrasts between the Canadian and Australian Constitutions," which appeared at the end of the chapter on Australia in the first edition has been omitted; useful though it was in some respects, its necessary incompleteness and over-simplification constituted it a trap for beginners.

And it is, of course, very largely for beginning law students that this book is devised. As such, it has already established a place for itself, a place which this new and admirably produced edition will secure still more firmly. The careful paragraphing, the lavish use of headings and sub-headings, of bold-face type and italics, make it an easy book to use, and, by way of its footnotes (expanded from the first edition), a most valuable reference source for further reading.

Professor Hood Phillips has accompanied it with a new edition of his case-book. New cases added are *MacCormick* v. *Lord Advocate*,[8] *Harris* v. *Minister of the Interior*,[9] *Bank voor Handel . . .* v. *Administrator of*

4 (1931) 44 C.L.R. 394.
5 [1955] Ch. 238 (C.A.).
6 The point was raised in the Supreme Court of Victoria in *MacDonald* v. *Cain* [1953] Argus L.R. 965, and two judges there concluded that the making of a declaration would *not* be an interference with the privileges of Parliament; this case seems not to have come to Professor Hood Phillips's attention.
7 As demonstrated, *e.g.*, in Jennings, *Constitutional Problems in Pakistan* (1957).
8 *Supra*, note 3; *Casebook*, 5.
9 *Supra*, note 2; *Casebook*, 8.

Hungarian Property,[10] *Bonsor* v. *Musicians Union*,[11] *R.* v. *Northumberland Compensation Appeal Tribunal*,[12] *Barnard* v. *National Dock Labour Board*,[13] and *Ellen Streets Estates, Ltd.* v. *Minister of Health*[14] (replacing *Vauxhall Estates, Ltd.* v. *Liverpool Corporation*[15]). The old must give way to the new, and in pursuance of this inexorable law some of the great cases of earlier centuries have perforce been dropped. Even John Hampden has disappeared. Time may have been with him, but Space, it seems, is against him.

Robin L. Sharwood.

Foa's General Law of Landlord and Tenant. Eighth Edition. By H. Heathcote-Williams, m.a., q.c., with E. Dennis Smith, ll.m., Ronald Bernstein, b.a., and Christopher Priday, b.a. [London: Thames Bank Publishing Co., Ltd. 1957. clxi and 902 and (index) 158 pp. £8 8s. net.]

The first edition of this well-known work appeared as long ago as 1901. The seventh edition appeared in 1947 under the editorship of H. H. Judge Forbes; the present edition is edited by Mr. Heathcote-Williams with a trio of assistants.

The editor follows the previous policy of omitting any treatment of the Rent Restriction Acts. In view of the existing bulk of the volume this decision cannot but be applauded. Moreover the fluid state of existing rent control legislative policy makes the inclusion of the Rent Acts in a book on the general law of landlord and tenant a hazardous and speculative enterprise.

Another feature of the previous editions which is still retained is the omission of the actual texts of the relevant statutes (save where these are cited in the text of the book itself) and also of statutory rules and orders, court forms and precedents. From the point of view of the practitioner for whom this book is intended such an omission is unfortunate. This is particularly so in the case of counsel or solicitors who desire to use the book in county courts, for the need to cite the actual wording of statutes, etc., to the court may necessitate taking several volumes where one (bulky though it may be) should suffice. True it is that the inclusion of this material would add substantially to the size of an already over-ponderous volume, provided that no equivalent reductions of the text were made. But are no such reductions really possible? Looking through this work in the light of the sort of guidance the practitioner is likely to seek one cannot help feeling that there is a good deal of scope for a rather rigorous pruning of the text as it now exists. For while it is true that this work enjoys an enviable reputation as an admirably full and detailed exposition of the relevant case-law governing the relation of landlord and tenant, it may well be felt that a rather more concise statement might in many instances be equally if not more helpful to the practitioner, and would allow additional space for matters now excluded. Thus to give a single illustration, is it really necessary to devote practically a page of the text to discussing the rather esoteric point whether a covenant against "letting" prohibits an assignment (p. 276)? Again the discussion on covenants in general on pages 112–129 seems both unduly lavish and not terribly rewarding, and does a modern textbook really require to devote 105 pages to the subject of distress (pp. 480–585, to say

[10] [1954] A.C. 584; *Casebook*, 66.
[11] [1956] A.C. 104; *Casebook*, 243.
[12] [1952] 1 K.B. 338; *Casebook*, 382.
[13] [1953] 2 Q.B. 18; *Casebook*, 399.
[14] [1934] 1 K.B. 590; *Casebook*, 2.
[15] [1932] 1 K.B. 733.

nothing of the further nine pages regarding distress in connection with rent, on pp. 167–175)?

As against this, a modern topic of outstanding importance, *viz.*, security of tenure relating to business tenancies, receives fairly summary treatment in twenty-four pages (pp. 755–779). This section does hardly more than follow the order of the provisions of Part II of the 1954 Act with little attempt to tackle or afford guidance on the many practical problems with which both landlords and tenants are faced under the provisions of that Act. Also the book seems to have been finally prepared for the press as long ago as January, 1957 (the date given in the Preface), so that so far as can be seen no case-law after that date is cited. This, no doubt, accounts also for the failure to include a reference to subsequent statute law of vital importance to the general law of landlord and tenant, such as section 16 of the Rent Act, 1957, dealing with notices to quit. As the book was not published until November, 1957, this is rather unfortunate to say the least.

The curious dilemma in which the editor is placed by adhering to the plan not to publish appendices containing statutes, rules and orders, etc., is sufficiently revealed in his treatment of the Agricultural Land Tribunal. This subject is dealt with in Part III, Chapter 8, which consists almost entirely of a verbatim text of the Agriculture (Procedure of Agricultural Land Tribunals) Order, 1954. No doubt this is very useful in itself but the same could be said of other rules and orders which are not included. Moreover, had this order been set out in an appendix, the chapter of the text might have been devoted to points of elucidation for which no space has been found.

On the whole then, although this work will undoubtedly continue its worthy tradition of affording invaluable guidance to the practitioner on the general law of landlord and tenant, the feeling is inescapable that this edition can only be accepted with some reservations. Perhaps when the 9th edition comes to be prepared (and one hopes that the profession will not have to wait as long as ten years on this occasion) a more thorough-going effort may be made to modernise the book and make it the really admirable working instrument that it still falls a good way short of being.

Dennis Lloyd.

International Law. Volume 1. International Law as applied by International Courts and Tribunals: Part I. By Georg Schwarzenberger, ph.d., dr.jur. Third Edition. [London: Stevens & Sons, Ltd. 1957. xlviii and 681 and (bibliography) 92 and (index) 31 pp. £3 3s. net.]

Dr. Schwarzenberger's new edition evidences his great capacity for work and the acute analysis that characterises his writing. He adopts the inductive approach. Every decision of the International Court is carefully sifted and the legal principles which it supports are abstracted and placed in the general pattern of his systematic exposition. Furthermore, in this new edition he attempts a critical evaluation of the material he uses, his standards being the "rules governing the fundamental principles of international law, that is to say, sovereignty, recognition, consent, good faith, self-defence, international responsibility and the freedom of the seas" (pp. 9, 10). He is careful not to use sociological and ethical standards and refuses to accept natural law as an admissible law-creating process. On the other hand he continually and correctly emphasises the use of judicial discretion inspired by common sense and good faith—what he terms *jus aequum*. Application of this *jus aequum* of course is bound to entail a value-judgment and in practice it amounts to admitting natural law through the back door, though this is a natural law relative to time and place. Thus we find Dr. Schwarzenberger saying:

> "Unless the exercise of judicially tempered discretion were arbitrary, it is necessarily inspired by considerations of reasonableness and good faith or, in short, equitable considerations. These need not be the equities of any particular case, but, as would become any legislative or quasi-legislative organ, may well be the equities of typical cases in the same category" (p. 53).
>
> "Moreover international judicial institutions tend to interpret any legal obligations in a spirit of reasonableness and good faith, and thus in effect apply to them the *jus aequum* rule. This means that the prohibitions or commands of rules of international law are themselves qualified by apparently inherent limitations in scope. In fact, these are extraneous limitations. They are attained through the chiefly inarticulate application of the *jus aequum* rule to rights and obligations under any of these rules" (p. 573).

It may be that in emphasising this *jus aequum* there is a tendency to introduce it in all situations where there is an absence of *jus strictum*. The absence of *jus strictum* does not necessarily imply the presence of *jus aequum*. International law is still in a process of developing and many situations are embraced neither by *jus strictum* nor by *jus aequum*. Certain writers, most noticeably Judge Sir Hersch Lauterpacht, have denied the existence of *lacunae* in international law (see, for example, *The Function of Law in the International Community*, pp. 65–69). They base their argument on Article 38, paragraph 3, of the Statute of the International Court authorising the judges to apply "general principles of law recognised by civilised nations," wherever there is an absence of conventional or customary rules of law. But as Dr. Schwarzenberger notes, "in its practice, the World Court, as such, as distinct from some of its individual members, has shown a marked reserve towards the general principles of law recognised by civilised nations" (p. 46). Dr. Schwarzenberger points out that the International Court is more likely to develop the law by use of analogies with existing rules of international law than by application of general principles of law recognised by civilised nations.

The *jus aequum* rule is used by the author as a rule of interpretation. It is not used as an alternative to *jus strictum* but merely as a qualification on the application of *jus strictum*. However, in discussing the requirement of fault as a constituent element of an international tort he explains away the fact that international arbitral tribunals have here alternatively applied both subjective and objective tests of liability as an application of the *jus aequum* rule, pages 632 *et seq.*, especially at page 652. Is he not attempting to reconcile the irreconcilable by an application of the *jus aequum* rule? "Judicially tempered discretion in its articulate form," he terms it. In practice alternative tests of international delinquency ought to be avoided. While most of us will agree with Dr. Schwarzenberger that flexibility in the application of rules of law is desirable, can it be said that flexibility in the choice of which rules to apply is desirable? Fortunately this particular branch of international law is now well expounded in the judgment of the International Court of Justice in the *Corfu Channel* (*Merits*) case, 1949, to which Dr. Schwarzenberger pays special attention.

The great merit of Dr. Schwarzenberger's approach to the subject is that throughout his work we find ourselves in the realm of international law proper. So often a confusion of the principles of municipal law and those of international law leads to hopeless entanglements and to a forgetting of basic principles. This confusion has its worst possible repercussions in the field of recognition, regarding the constitutive and evidentiary effects of the recognition. The "constitutive" effect of all executive decrees is essentially confined to the municipal sphere. In the international sphere the effect of unilateral declarations is purely evidentiary. Thus, as Dr. Schwarzenberger rightly points out, the "legal effect of recognition is to create an estoppel"

(p. 127). His chapter on recognition (Chap. 7) is short and concise and might profitably be read by all students who wish to grasp the nature of recognition.

This first part of Volume 1 is noteworthy for a lengthy and valuable analysis of the various modes of treaty interpretation (Chaps. 27, 28) and a detailed account of international delictual responsibility (Chaps. 31–36). These two subjects typify the author at his best. They evidence his own peculiar ability to expound that which is both detailed and difficult with the greatest degree of clarity. Each of these topics has been expanded in this new edition.

The chapter on international economic law has also been thoroughly revised. In addition to a critical analysis of the *Oscar Chinn* case (1934) the author deals with three cases which have recently come before the World Court: the *Anglo-Iranian Oil Co.* (*Jurisdiction*) case, 1952, the *Rights of U. S. Nationals in Morocco*, 1952, and the *Ambatielos* (*Merits: Obligation to Arbitrate*) case, 1953.

This edition of Volume 1 has been produced in two parts. This is occasioned partly by additions to the text, but primarily because the author and his publishers have chosen to use a larger type which is less tiring on the reader's eyes than that used in the second edition. The second half, dealing with War and Neutrality and the Law of International Organisations, is to be published shortly.

Any appraisal of this work must be done in the light of its author's field of reference. This is, according to the preface to the first edition, to "make the reality of international law more evident . . . by a change in emphasis from national attitudes and subjective views of writers to the certainty provided by the decisions of international courts and tribunals." He himself recognises that the decisions do not form a system of binding precedent, and it is doubtful how far the teaching of international law can rely on the case method. On the other hand such decisions have great persuasive value and an analysis and commentary on them such as is provided by this work is in itself a valuable contribution to the study of international law.

One might, however, be forgiven for questioning whether in all cases such decisions have made for absolute certainty in the law. Such decisions as the *Reservations to the Genocide Convention* (*Advisory Opinion*), 1951, and the number of dissenting judgments, which in themselves have a certain persuasive authority, might suggest that the persuasive authority of a decision of an international court is by no means final, whilst decisions of various arbitral tribunals have correspondingly less authority. On the other hand it is not open to doubt that decisions of the International Court constitute a most valuable modern evidence of international law.

It may be argued that an approach by way of case law overlooks the more practical day-to-day work of Foreign Offices and international organisations as evidence of custom or principles of international law, but presumably the second Volume, when it appears, will do much to emphasise this aspect of international law and maintain the balance of Dr. Schwarzenberger's work.

While we have had a large number of authoritative decisions over the last seventy years, they do not cover the whole field of international law. Until we have some form of popular and compulsory jurisdiction, large areas of law will remain subject to speculation. A work relying on the decisions of courts and tribunals for its *sedes materiae* is bound to reflect the unbalanced nature of the subjects which the International Court has had an opportunity of discussing. Had Dr. Schwarzenberger set out to provide an elementary textbook on the subject then this criticism would be very real, but in fact the work under review is not an elementary textbook. It does not set out to fulfil the same function as, for example, Oppenheim, which is perhaps a more suitable book for the average student studying international law for a first degree. For such a student Schwarzenberger is better treated as a reference book; and, within its own range, it is a first-class reference book.

For teachers, practitioners and anyone engaged on research the book should prove invaluable. It is without comparison as preliminary reading for anyone engaged in research, on account of its exhaustive treatment of all the better-known decisions of the International Court and the various arbitral tribunals, and more especially because of the extensive bibliography which has been compiled by Dr. B. Cheng and Mr L. C. Green.

One final point may be made. Dr. Schwarzenberger's original intention was to treat international law in three volumes, dealing with the subject as applied in international courts and tribunals, British State practice and British judicial practice. The present volume under review—*International Law as applied by International Courts and Tribunals*—first appeared in 1945 and has now run to a third edition. The further volumes have not been completed, though it now appears that they are to be combined in a second volume—*International Law as applied in British Practice.* It is perhaps as well to treat judicial and diplomatic practice together for, while each may have distinct lessons for us, treatment in separate volumes would emphasise the discrepancies which may exist and perhaps blind us to the close approximation of judicial and diplomatic practice, particularly in such fields as recognition and immunities wherein the judicature follows executive practice.

This second volume, if it maintains the high standard of the first volume, should be an even more significant contribution to international law. In the absence of a British Digest of International Law, lawyers must rely on privately built digests. *International Law as applied in British Practice* should to a large degree fill the gap, at least until the way is clear for the publication of a British Digest.

J. A. Andrews.

Bilateral Studies in Private International Law: No. 8, American-Australian Private International Law. By Zelman Cowen. [New York: Oceana Publications. 1957. 108 pp. incl. index 14 pp.]

With the typically American passion for projects, the Parker School of Foreign and Comparative Law of Columbia University, New York, is in the process of issuing a flood of Bilateral Studies in Private International Law, of which the book under review is the latest. In those already issued, American private international law is bilaterally studied with Swiss, French, Dutch, German, Colombian, Greek and Danish private international law: many may feel that, since American private international law may appear to them as a doleful and omnivorous bog in which full faith and credit, *res judicata* and State Policies flounder aimlessly and hopelessly, dragging judges, lawyers and writers down with them, it might have been more profitable, in the commercial as well as the academic sense, to have made the permanent point of reference English, instead of American, private international law. Thoughts such as these will not, however, bother the reader who in spite of all is convinced that American private international law has no equal in clarity, precision, and general worth; they will not bother the reader who will not want to invest in the majority of these bilateral studies anyhow because he has Dr. Rabel's monumental treatise; and they need not bother the English or Commonwealth reader who will want to have access to the book under review not only because Australian-American private international law is the only subject in this field in which a bilateral study of this nature appears particularly appropriate, but because it contains the only extant survey of the peculiar difficulties in Australian private international law arising out of a federal system of government. This alone makes the book useful and desirable.

Any suggestion that a profound and detailed treatise on this subject could be crowded into seventy-nine pages of text must, of course, be met with frank disbelief. In this respect, Professor Cowen has obviously, and no doubt as much to his regret as ours, been obliged to write within an editorial policy which has demanded of him no more than a fairly concise and summarised statement of Australian private international law and the essential difference between it and American law. Those who have read Professor Cowen's article, "Diversity Jurisdiction: The Australian Experience" (1955) 7 *Res Judicatae* 1, will consider it unfortunate that the editors of the series, having availed themselves of the learning of an acknowledged specialist in the subject, could not have made it possible for Professor Cowen to set out his views on this and other topics in considerably greater detail. It is unnecessary to add that, within the scope allowed him, Professor Cowen has performed his task more than adequately, and has written, as usual, with precision and clarity. The essential differences between the two systems of private international law under constitutional frameworks which are superficially very similar are clearly brought out, and the sections on Full Faith and Credit and Diversity Problems in Jurisdiction are valuable not only in illustrating these differences, but also for the assistance they give toward a clearer understanding of the Australian law on these points.

One or two blemishes in the otherwise excellent presentation should be noted, although they are probably matters rather of personal preference than of anything else. One wonders, for example, whether it is altogether appropriate to refer (on p. 5) to the Statute of Westminster as "the great charter of Commonwealth relations." It may perhaps be a little misleading to those not intimately acquainted with American constitutional history to say (on p. 6) that in "the general distribution of powers, Australia followed the United States by investing the Commonwealth with specific powers, while the States were left with the residue of powers not specifically conferred." No doubt the discussion (on p. 7) on the taxation of incomes of foreign diplomats had to be included for the sake of completeness, but it is rather difficult to appreciate its immediate relevance. Nor is it clear what light the discussion on the doctrine of *renvoi* (on p. 11) sheds on the essential differences between the two systems of private international law. The point made by Professor Cowen (on p. 17) on the influence of the decisions of the Judicial Committee of the Privy Council on Australian courts is perhaps inclined to mislead if it is not clearly understood that not one of the Privy Council cases cited by Professor Cowen in this respect was taken on appeal from Australia. While one might disagree with Professor Cowen, *e.g.*, on his analysis of *Phillips* v. *Eyre* (1870) L.R. 6 Q.B. 1 (on p. 27), it is impossible to suggest that his comments on this and various other controversial topics are not both valuable and stimulating. In particular, Professor Cowen's brief disagreement with the deplorable decision of the Full Court of the Supreme Court of Victoria in *Fenton* v. *Fenton* [1957] V.L.R. 177, on which he has already written at length ((1957) 31 Aust.L.J. 8), will be welcomed.

It is unfortunate that there should be cause for complaint about two other matters, since Professor Cowen can hardly be blamed for them. One is the insistence of American publishers on rendering citations to English and Commonwealth law reports meaningless by inverting them to conform to the American mode of citation. This is, of course, due to ignorance, but since in the vast majority of series of law reports the correct citation is shown on the title page, and since in any event it is no great effort to ascertain the correct conventions in citation by referring to any English or Commonwealth treatise, such ignorance is hardly excusable. The other matter, and one which the English or Australian reader may find intensely

irritating, is the Americanisation of the titles of judges: thus the conventional, *e.g.*, "Higgins J." is rendered throughout as "Justice Higgins." A third, but entirely trivial, matter is that whoever was in charge of preparing the index leads us to believe that Professor Cowen is of the view that there is such a thing as a "private international tort" (p. 105).

It may perhaps be wondered why it has been necessary to consume so much space in reviewing what is after all only a summarised account of Australian private international law and the differences between it and American private international law. The main value of this book is, however, that it is the only one of its kind; that it is, as far as any writing on private international law can be, reliable; and that it raises our hopes that Professor Cowen may before too long be induced to present us with a much fuller exploration of the fields to which he has briefly introduced us in the present volume.

B. D. Inglis.

The Unpublished Opinions of Mr. Justice Brandeis. By Alexander M. Bickel, with an Introduction by Paul A. Freund. [Cambridge, Massachusetts: The Belknap Press of Harvard University Press; London: Oxford University Press. 1957. xxi and 278 pp. Price in the United Kingdom £2 8s.]

This book contains eleven opinions which Mr. Justice Brandeis wrote between 1916 and 1939 as a Justice of the Supreme Court of the United States, but which were not delivered and therefore not published, together with Professor Bickel's explanations of and comments upon their fate, background and significance.

None of these opinions relates to a subject of special interest to English readers who in fact will sometimes find it difficult to follow the precise point in issue. Yet some English readers are likely to be attracted by this book on account of the light it throws upon the problems of the judicial process, for, as Professor Freund rightly emphasises in his Introduction, these opinions and the circumstances in which they came to be written and discarded or superseded "reveal to a rare degree the creative process of judicial judgment" and "the processes of collective decision-making" (p. xv).

It is a problem about which much too little is known in this country. It is, of course, true that in British courts (other than the Privy Council) each member has the right and almost the duty to deliver his own separate opinion, so that it is neither necessary nor proper to try "to make a court." Yet it is difficult to believe that our judges prepare their opinions independently of each other. And would one of them send a note to another commenting upon the opinion of a third in the words of Holmes (p. 155): "You probably have noticed the humbug at the bottom of page 5 of Sutherland's recirculated 98"?

Perhaps it is all to the good that we do not know the answer. Professor Freund thinks (p. xvi) that "the claims of history, the interest of a succeeding generation in understanding, judging and profiting from the deliberations of their predecessors," justify publication of these opinions and that publication cannot be considered improper, because Mr. Justice Brandeis preserved his working papers and entrusted them without restrictions to Mr. Justice Frankfurter who later transferred them to the Harvard Law School. Similarly, in America it is not at all unusual or considered improper to induce jurors to disclose the secrets of the jury room. It is, however, by no means certain that the restraint inherent in the English practice is not to be preferred or tends to deprive us of any appreciable measure of insight.

F. A. Mann.

Battles at the Bar. By K. L. Gauba. [India: N. M. Tripathi, Ltd., Princess Street, Bombay. 1957. 281 pp. 25s. net.]

When an advocate has been sentenced to imprisonment for six months, the maximum sentence, for contempt of court, and later found guilty of unprofessional conduct and suspended for six months, his memories are unlikely to be dull. So it is with this book.

The contempt proceedings arose out of the author's petition to the Sovereign, praying for an inquiry into the affairs of the Special Official Receiver, who was said, to put it shortly, to be lining his pocket with the assistance or at least the knowledge of certain of the judges. Mr. Gauba had thought it his duty to tell the police such facts as he knew concerning this official, and to suggest to them that the facts disclosed the commission of criminal acts. The police inquiries were stopped by the order of the court, a proceeding which sounds little less than fantastic to English ears. Mr. Gauba successfully appealed against this order to the Privy Council.

Encouraged by the rebuke to the judiciary implied from the opinion of the Privy Council, Mr. Gauba drew upon his experience of his relations with the judiciary and compiled his petition to the Sovereign. He also published some 500 copies of it in book form. The contents of the petition, which ran to fifteen chapters, provided the foundation for the contempt proceedings.

This warfare between Mr. Gauba and the receiver and the judiciary was waged with a tremendous volume of legal subtlety. To take but one example, the receiver, hearing that the book was being written, and having started bankruptcy proceedings against Mr. Gauba some years before, applied to the court for an order that the typescript be delivered to him. His ostensible reason was that he was the proper person to promote literary enterprises of the bankrupt and that he was acting solely that the creditors might benefit from the profit upon the book.

The court acceded to the receiver's request, the typescript was handed over, and Mr. Gauba informed no one, since he had not been asked, that the book was already in type.

Although Mr. Gauba was imprisoned, the Chief Justice was told that an official inquiry would be held unless he submitted his resignation, which he chose to do.

Mr. Gauba has not, unfortunately, discussed the wider issues raised by his conflicts with authority. When a legal system is imposed from without, by the same power which assumes the civil administration, whether in Ireland, Cyprus or India, it is difficult to maintain that distinction between the executive and the judiciary which we in England have inherited. This book is pre-eminently all about Mr. Gauba; it is a pity that he has not taken his almost unique advantage of giving us his views on problems which will remain when the ephemera of this book have passed away.

Allister Lonsdale.

Constitutional Developments in India. By Charles Henry Alexandrowicz, Professor of International and Constitutional Law at the University of Madras. [London: Oxford University Press. 1957. viii and 255 pp. 21s. net.]

The Supreme Court and Judicial Review in India. By Sri Ram Sharma, Director, Institute of Public Administration, Sholapur. [Sholapur: Institute of Public Administration. viii and 50 pp. 6s. net.]

With the exception of Professor Morris-Jones's study of *Parliament in India*, recent books on the Indian Constitution have been devoted predominantly to judicial review. Professor Alexandrowicz's general survey of the working of

the Constitution over ten years is particularly useful because it deals with problems which, although of interest to readers in this country, have been somewhat neglected by other writers. The author's wide experience of other political and legal systems has left him especially well equipped for his task. His book falls roughly into two parts, the first comprising a study of some aspects of judicial interpretation and the second covering such matters as the constitutional status of the President and State Governors, the formal structure and practical working of Indian federalism (including a very helpful examination of the important constitutional changes made in 1956), elections, and the place of India in the Commonwealth and the international community. Some of these topics are treated in an elementary way, but the work as a whole can be recommended as a lucid general introduction to Indian constitutional law.

One controversial issue deserves a brief comment. Professor Alexandrowicz has no doubt that the wide discretionary powers vested in the President by the Constitution must be exercised more or less in conformity with the constitutional conventions obtaining in the United Kingdom. It cannot be assumed, however, that the Prime Minister will indefinitely remain the dominant figure in Indian political life, and the absence of formal limitations on presidential discretions may perhaps be regretted one day. It would have been possible to incorporate into the Constitution a provision analogous to those provisions of the Constitutions of Ceylon and Ghana whereby the Governor-General is explicitly required to observe, as far as may be, the conventions applicable to the exercise of similar functions by Her Majesty in the United Kingdom. Such a provision might perhaps have been objected to on political grounds; on the other hand, the Indian Constitution expressly gears the privileges of Parliament to the privileges enjoyed by the United Kingdom House of Commons, and the powers of the President in India are in fact very similar to those exercised by a Governor-General.

Readers who have no knowledge of the role of the Supreme Court in the Indian Constitution may find Sri Ram Sharma's monograph, written in 1953, an informative introduction. But their curiosity can more adequately be satisfied if they refer to larger works, and it cannot be said that the author has displayed either the literary dexterity or the ability to concentrate on essentials that one hopes to find in a general essay on a large and complex theme.

S. A. de Smith.

Notable American Trials. By Francis X. Busch. (1) Guilty or not Guilty? The Trials of Leo Frank, D. C. Stephenson, Samuel Insull, Alger Hiss. (2) Prisoners at the Bar. The Trials of William Haywood, Sacco and Vanzetti, Loeb and Leopold, Bruno Hauptmann. (3) They Escaped the Hangman. The Trials of Caleb Powers, Halbert Patrick, Frances Hall, Hans Haupt. (4) Enemies of the State. The Trials of Mary Eugenia Surratt, Alphonse Capone, The Rosenbergs; The Teapot Dome Cases. [London: Arco Publications, Ltd. 1957. Four vols. 287 pp., 288 pp., 301 pp., 299 pp. 30s. net each.]

In his foreword to the first volume of *Notable American Trials,* which was published in the United States in 1952 and is now being reissued in this country from American sheets with its three companions, the editor states that the plan of his work "has been influenced *to an extent* by that most excellent series . . . of *Notable British Trials.*" English readers, however, will recognise at once that the "extent" of the similarity is slight. Mr. Busch—who is described as "one of America's great attorneys"—makes no attempt to provide, in the limited space available, anything like a full transcript or abstract of the proceedings in court.

These *Notable American Trials* set out to give a concise description of the outstanding features of certain celebrated trials selected not so much for the importance of the legal issues involved but largely, it appears, on account of the world-wide publicity they received in their time. No great pains are taken to separate fact from comment, and the editor's "non-technical condensation" aims in the first place at the prevailing taste for crime reports among the general reading public.

The publishers claim that Mr. Busch has succeeded in reducing "mountains of materials to the essentials of fact, human interest, excitement, suspense and sympathy," and that as a result these stories of real fact are "more fascinating than fiction" and "more exciting than any whodunit." That is according to taste. What must be said is that, in the attempt to trim these accounts of all "that is not to the point" and to "make the issues understandable by all," the trials of Sacco and Vanzetti, of the Rosenbergs, of Alger Hiss and others are here presented in a manner which can be wholly satisfying only to those whose appetite is for the sensational.

For those whose interest and curiosity cut a little deeper, the upshot of such simplification is not only frustrating, but often positively disquieting. The number of questions raised in one's mind by these accounts far exceeds those which are acceptably settled; and it is not only the fairness and objectivity of individual proceedings and their results but sometimes even the general judicial methods and the whole climate in which important criminal trials take place in the United States which tend to be thrown into doubt.

Fortunately, there is no reason to assume that the picture offered in these *Notable American Trials* must be taken, as the blurb suggests, as "typifying the administration of justice in the United States." Or should it?

H. A. HAMMELMANN.

DAS SCHWEIZERISCHE PATENTRECHT. KOMMENTAR ZUM BUNDESGESETZ BETREFFEND DIE ERFINDUNGSPATENTE VOM 25. JUNI 1954. DR. RUDOLF E. BLUM and DR. MARIO M. PEDRAZZINI. [Bern: Verlag Stämpfli & Cie. 1957. Band 1, pp. 511. Price DM. 79,–.]

THE Swiss Patent Law of June 25, 1954, has made necessary a commentary to replace that in two volumes of R. Weidlich/E. Blum of 1934–36. The present commentary has been newly written, the first of its four volumes having appeared in 1957 and the second volume is due in 1959.

A perusal of the published volume covering the first sixteen articles (out of a total of 118) shows that the work will be of value both to the academic exponent of principles and to the specialist, whether lawyer or patent agent. The authors have not limited themselves to line by line comments on the various articles but have discussed past developments, present theories and their estimate of future trends over a wide range of subjects in relation not only to Swiss law, but also to that of other countries, especially Germany. The commentary is thus to some extent a work of comparative law, although, as one would probably expect, the standards of comparison are continental and occasionally American (U.S.) but not British. Very full references are given to periodic literature (*e.g., Gewerblicher Rechtsschutz und Urheberrecht*) and the bibliography runs to nine pages.

It is a pleasure to refer to this volume owing both to its excellent printing and get up, and to the clarity of its writing.

Specialists will await the second volume with some impatience.

L. A. ELLWOOD.

Securities for Bankers' Advances. By James Milnes Holden, ll.b., ph.d., a.i.b., Barrister-at-Law. Second Edition. [London: Sir Isaac Pitman & Sons, Ltd. 1957. xxxii and 360 pp. with index. 35s. net.]

It is not surprising that a second edition of this exceedingly useful work has been called for already, after only three years from its first appearance. So much of the practical business of banking is concerned with security work that, even allowing for the fact that the technical side is looked after in the legal departments of the banks, every responsible bank officer is the better for a sound grasp of the rules underlying it and this is just what Dr. Holden provides for him in these pages.

The book was very favourably mentioned in the *Review* on its appearance (see Vol. XVII, p. 495) and since no substantial changes have been made this edition does not call for detailed comment. Further reflection and no doubt the suggestions of readers and reviewers have enabled Dr. Holden to make a large number of welcome improvements however. We may note as typical of these the three additional disadvantages of using land as a security for bank advances which are mentioned and discussed at the end of Chapter I. These additions, together with a number of references to recent decisions, add up in the aggregate to no less than seventeen pages of text which is a sufficient indication that this edition is a good deal more than a mere reprint.

C.

Overseas Trade Corporations. By David R. Stanford, m.a., ll.b., of the Middle Temple, Barrister-at-Law. [London: Sweet & Maxwell, Ltd. 1958. xx and 339 pp. 35s.]

This, the first of the new series of *British Tax Review Guides,* is a useful and well-written account of the new status of Overseas Trade Corporations created by the Finance Act, 1957. As Mr. Stanford frankly emphasises in his Preface, the information at present available is wholly theoretical. Nevertheless he has produced a valuable book, not least because full use has been made of the guidance to the likely practice of the Revenue given in the Commons' debates. The book has been broadly conceived and deals with all relevant aspects of company taxation, including double taxation. It should enable the reader to understand clearly both the nature of the problem sought to be solved by the new legislation, the attempted solution, and the likely advantages and disadvantages in each case of the status of Overseas Trade Corporation. Both he and the publishers are to be congratulated upon having met a professional need so promptly and efficiently.

L. C. B. G.

Plain Tales from the Courts. By W. J. Dobie, ll.d. [Edinburgh: W. Green & Son, Ltd. 1957. 236 pp. 25s. net.]

Volumes of professional reminiscences are either remarkably good or equally bad. This collection comes into the good category, although the scales sometimes oscillate uncertainly.

The reader should not be deterred by the turgidity of the first thirty or so pages. Sheriff Dobie left his papers unrevised; a friend has carried out some revision of the text, but unfortunately the first chapter is still rather woolly.

The sheriff plays a part in the administration of Scots law analogous to that played by a combination of county court judge and recorder. The role, perhaps, is less unusual when it is recalled that not infrequently a county court judge is also chairman of a county quarter sessions. Sheriff Dobie's experience lay not only in the civil and criminal law; he sat in a rural area and later as sheriff-substitute in Glasgow.

The English lawyer will find, interspersed among what may be called the usual and customary anecdotes, some interesting details of the life of bar and bench beyond the border. When the book has got into its stride and recovered its second wind, Sheriff Dobie is revealed as a delightful and courteous author.

ALLISTER LONSDALE.

COPYRIGHT AND FILM. By ÅKE LÖGDBERG, Professor of Law at the Lund University, Sweden. [Carl Bloms Boktryckeri A–B. 1957. Price not stated.]

THIS review is based upon an abridgment in the German language of the above work which was published in the Swedish language in the year 1957. It is not easy to gather from the abridgment what is the size of the original work, but it appears to be divided into nine chapters or parts and to be concerned with a very full examination of the law of copyright both in Sweden and elsewhere as it applies to cinematograph films.

An examination is first made of the history of the development of films and of the law relating to films both in the Berne Convention as it has been modified from time to time and in the laws of individual countries. Then there is an examination of the basic principles of copyright to see how these are applicable in the case of a work such as a film. The usual basic principles are displayed, namely, whether copyright protection is given because it is a natural right of property or because it is in the interest of the community to encourage authors and artists or because it is a personal right of authors which ought to be protected under any proper system of law. Then there are the considerations that copyright protection is not given to ideas but only to ideas in a concrete form, but on the other hand it is not given to subject-matter which is in the realm of technical or industrial invention. These problems also have an important bearing on who is to be treated as the author of a film. If one takes the view that one is protecting property rights in the completed work which is partly the result of ideas and partly the result of technical performance, then one may take the view that the film company is the proper person to be treated as the copyright owner. On the other hand, if one takes the view that all that should be protected is something in the realm of drama, literature or art, then one may take the view that the relevant author is the script writer or perhaps the director and a different system may result.

It will be recollected that in English law until the Act of 1956, cinematograph films were protected either as dramatic works or as photographs, but that the Act of 1956 for the first time confers copyright on films as such and gives the copyright to the person by whom the arrangements necessary for the making of the film are undertaken. In theory, therefore, we have passed from the second to the first notion of copyright protection above referred to. On the other hand, having regard to the contractual arrangements which film companies are always careful to make, it may be doubted whether any practical difference has arisen. No real difficulty has ever arisen in this country as to the ownership of copyright in films and indeed, until very recently, and then in rather special circumstances, there has been no reported case of infringement by film of film. The usual type of case is where a film is alleged to infringe copyright in a book or play.

The work under review, however, has obviously dealt with these basic underlying aspects of the law with the greatest completeness, dealing separately with the law in different countries as expressed in statutes and as stated by textbook writers. It would appear that this matter has not hitherto received great attention in Swedish law and no doubt a work of this kind is of local value although its completeness would appear to be such that it will be of interest to anyone able to read it in the original.

There is an annexe dealing with the draft Copyright Bill newly issued by the Swedish Copyright Committee in which comment is made upon the provisions of the Bill from the point of view of the matters dealt with in the book.

F. E. Skone James.

The Elements of Estate Duty. By C. N. Beattie, ll.b., Barrister-at-Law. Second edition. [London: Butterworth & Co. (Publishers), Ltd. 1957. xxviii and 190 pp. 27s. 6d. net.]

The late Dr. A. Farnsworth, in Volume 16 of this *Review*, welcomed the first edition of this book which, as its title shows, does not seek to compete with the standard works on the subject but to act as an introduction for students to one of the most complex parts of the law. Now, precisely five years later—an appropriate period in view of the subject-matter—a second edition has been called for by the many changes in estate duty law during this time.

Most of the important statutory changes, all of which have been successfully incorporated in the book, have been made by the Finance Act, 1954. They include modifications in the law relating to the valuation of shares in controlled companies on an assets basis (pp. 91–95), the application of reduced rates of duty on the agricultural scale to industrial hereditaments, machinery and plant (pp. 116–117), exemptions from aggregation, *i.e.*, certain life policies in which the deceased never had an interest (pp. 121–122) and unsettled property not exceeding £10,000 (pp. 122–123), and the alteration in the scale of rates of duty (p. 114 and appendix). The effect of section 38 of the Finance Act, 1957, dealing with *inter vivos* gifts which have "disappeared," is effectively summarised at pp. 47–48. The only statutory provision less happily incorporated primarily concerns property law and occurs on p. 19, where the unaltered statement of the rule as to *commorientes* would, I think, be taken to represent the joint effect of the statutes referred to, *i.e.*, the "Law of Property Act, 1925, s. 184 as amended by section 1 (4) of the Intestates' Estates Act, 1952," which, of course, it does not.

The activity of the courts in relation to estate duty is reflected in numerous amendments to the text and no relevant decisions seem to have been overlooked save, perhaps, that on p. 41 the phrase "extinguishment. . . by way of gift" should have been altered in view of the Court of Appeal's observations (differing on this point from the court below) in *Re Stratton's Deed of Disclaimer* [1957] 2 All E.R. 594.

There are one or two printer's errors: "established" instead of "establish" on p. 60 (carried over from the first edition); section 1 (*b*) instead of section 2 (1) (*b*) on p. 70 (12 lines from bottom); and "Y" on p. 148 should be "A." Further on p. 42 it would seem that note 7 should refer to section 53 (1) (*b*) not section 54 of the Law of Property Act, 1925.

Generally, however, an excellent students' text-book has been well brought up to date. Moreover the learned author is to be congratulated on the rare feat of reducing the length of the text in the process.

Philip H. Pettit.

Books and Publications Received

Trade Unions and the Individual. By Cyril Grunfeld. Fabian Research Series, No. 193. 33 pp. The Fabian Society, 11 Dartmouth Street, S.W.1. 3s.

Sir James Fitzjames Stephen, 1829–1894, and his Contribution to the Development of Criminal Law. By Leon Radzinowicz, ll.d. Selden Society Lecture, July 30, 1957. 70 pp. Bernard Quaritch, 11 Grafton Street, London, W. 6s. 6d.